# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1960**

## No. 257

H. K. PORTER COMPANY, INC., ET AL.,
APPELLANTS,

*vs.*

CENTRAL VERMONT RAILWAY, INC., ET AL.

## No. 258

INTERSTATE COMMERCE COMMISSION,
APPELLANT,

*vs.*

CENTRAL VERMONT RAILWAY, INC., ET AL.

## No. 266

UNITED STATES, APPELLANT,

*vs.*

CENTRAL VERMONT RAILWAY, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

**FILED 257—JULY 22, 1960**
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# SUPREME COURT OF THE UNITED STATES

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H. K. PORTER COMPANY, INC., ET AL.,
APPELLANTS,

*vs.*

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## No. 258

INTERSTATE COMMERCE COMMISSION,
APPELLANT,

*vs.*

CENTRAL VERMONT RAILWAY, INC., ET AL.

## No. 266

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*vs.*

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

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[fol. A]

**IN UNITED STATES DISTRICT COURT**

**DISTRICT OF VERMONT**

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., et al., Plaintiffs,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed March 12, 1959

(Equitable Relief Sought)

[fol. 1] I.

The plaintiffs herein bring this complaint against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside and annulling certain reports and orders, more particularly hereinafter described, issued by the Interstate Commerce Commission (hereinafter sometimes referred to as the "Commission") dated May 7, 1958 and February 19, 1959, in a proceeding before the Commission known as Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company, et al.*, said proceeding embracing also Docket No. 31683, *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*; Docket No. 31684, *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*; Docket No. 31685, *Union Asbestos and Rubber Company* v. *The Baltimore* [fol. 2] *and Ohio Railroad Company, et al.*, and Docket No. 31686, *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*

II.

Plaintiff, Central Vermont Railway, Inc., is a railroad corporation organized and existing under and by virtue of the laws of the State of Vermont, with its principal office and place of business in St. Albans, Vermont. It is a common carrier engaged in the transportation of property and passengers in interstate commerce subject to the provisions of the Interstate Commerce Act, as amended, in and through the states of Vermont, Massachusetts, and Connecticut. The names of all the plaintiffs herein, each of which was a defendant in the proceedings before the Interstate Commerce Commission, are set forth in Appendix A annexed hereto and made a part hereof.

III.

This action is brought under the United States is made a defendant herein, and the jurisdiction of this court is conferred by, United States Code, Title 28, Sections 1336, 2321 through 2325, inclusive.

IV.

The venue of this action is in this court pursuant to the provisions of United States Code, Title 28, Section 1398, referred to above, because the orders of the Commission sought to be suspended, enjoined, set aside and annulled, require the plaintiffs herein, including Central Vermont Railway, Inc., which is incorporated in the State of Vermont and maintains its principal office in the City of St. Albans, State of Vermont, within the jurisdiction of this court, to publish, maintain and apply to the trans-[fol. 3] portation of crude asbestos, asbestos fibre, and asbestos refuse, shorts and waste, in carloads, originating at certain points within the Province of Quebec, Canada, and moving to certain destinations in North and South Carolina, rates, regulations and practices which will prevent and avoid alleged undue prejudice and preference said to be violative of Section 3 of the Interstate Commerce Act.

V.

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 383, and amendments thereto, commonly known as the Interstate Commerce Act, as amended, with specifically vested powers and duties respecting interstate and foreign commerce under said Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, and the various acts amendatory thereof and supplemental thereto.

VI.

The aforesaid proceedings before the Commission, in which the reports and orders herein complained of were made, and which reports and orders plaintiffs herein (defendants before the Commission) seek to have suspended, enjoined, set-aside and annulled, embrace five complaints, the first having been previously considered in Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & O. R. Co.*, 288 I.C.C. 793, by Division 3, decided May 25, 1953, but subsequently reopened for further hearing. The other four complaints were filed after the initial Commission report on the first complaint.

VII.

The complaint filed on behalf of *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company,* [fol. 4] *et al.* (Docket No. 30846), assails combination rates and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Charlotte, N. C. It alleges that those rates were and are unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly and unjustly preferential of manufacturers located at Chicago and Waukegan, Ill., and Milwaukee, Wisc., and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that plaintiffs herein be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and

asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof. Copy of that complaint is reproduced as Appendix B, attached hereto and made a part hereof.

## VIII.

Following a hearing on the aforesaid complaint, Examiner J. Edgar Snider submitted a proposed report which noted that the assailed rates were combination rates applicable to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border. That report, which is reproduced as Appendix C, attached hereto and made a part hereof, reads in part as follows:

> "Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable [fol. 5] for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.
>
> "So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.
>
> "The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed."

The report of the Commission, by Division 3, 288 I.C.C. 793, which is reproduced as Appendix D, attached hereto and made a part hereof, stated in part as follows:

> "Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte."

[fol. 6] The Commission found that:

> "the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered."

## IX.

By petition dated July 31, 1953, plaintiffs herein sought the reopening and reconsideration of the aforesaid proceeding. This petition was granted by order of the Commission dated April 5, 1954.

By petition dated May 17, 1954, the complainant sought "the further reopening of this proceeding for the purpose of rehearing and further hearing". This petition was granted by order of the Commission dated July 30, 1954.

X.

On certain dates thereafter, i.e., December 6 and December 13, 1954, four additional complaints were filed with the Commission on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683), Thermoid Company, Southern Division (Docket No. 31684), Union Asbestos and Rubber Company (Docket No. 31685), and Carolina Asbestos Company (Docket No. 31686), which collectively assail combination rates applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, Province of Quebec, to Charlotte, Marshville and Davidson, N. C., and North Charleston, S. C. Those rates are alleged to be [fol. 7] unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The complaint in Docket No. 31686 in addition alleges that combination rates applicable on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson, N. C., are unlawful in like respects. The prayer of each of these four complaints is that the plaintiffs herein be required to establish just and reasonable rates for future application from the specified Canadian origins to the specified destinations in North and South Carolina. Each of the said complaints, except the complaint in Docket No. 31684, also prays that reparation be awarded on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof. Those complaints are respectively reproduced as Appendices E, F, G and H, attached hereto and made a part hereof.

XI.

The five complaints aforementioned were heard (reheard or further heard in the case of the complaint in Docket No. 30846) on a consolidated record before an Examiner. Following the issuance of a proposed report by the examiner, exceptions thereto were filed by plaintiffs herein, and oral argument was held before the entire Commission. On May 7, 1958, the Commission issued a report and order,

which have been reproduced as Appendices I and J, respectively, attached hereto and made a part hereof.

## XII.

In the said report of the Commission, with Chairman Freas dissenting and Commissioners Mitchell and Goff not participating (officially reported in 303 I.C.C. at page 743), it was found (p. 755) that the assailed rates "insofar as the [fol. 8] transportation took or takes place within the United States" were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

It was further found (p. 756) that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory* to the extent that the rates to the considered destinations exceed or may exceed the rates applying from the same origins in Canada to Ambler, Pa., and other destinations in Official Territory taking the same rates, by the specific amounts set forth therein.

It was further found (p. 756) that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and

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* Official territory was defined by the Commission in *Southern Class Rate Investigation*, 100 I.C.C. 513, 518, as

"Official territory, as the term is used in this report is roughly the territory east of the Mississippi River and north of southern territory (South of the Ohio River and south of the line of the Norfolk & Western from Bristol, Tenn.-Va., to Norfolk, Va., not including the eastern corner of Kentucky served by the Chesapeake & Ohio), including the lower peninsula of Michigan and a small strip of southern Wisconsin. It is the territory in which freight rates are governed by the official classification, and is divided, from west to east, into central territory, the Buffalo-Pittsburgh zone, trunk line territory and New England territory." (Material in parentheses supplied.)

waste, from Danville, St. Malachie, and Warwick, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of complainants' com-[fol. 9] petitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

It was further found (p. 756) that the complainants in Dockets Nos. 30846, 31683, 31685 and 31686 were damaged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the basis therein found to have been just and reasonable.

XIII.

The report of the Commission does not set forth the measure of the assailed rates or the measure of the allegedly preferential rates in so far as transportation thereunder took or takes place within the United States, nor does it set forth the extent to which the preference found and stated in cents relates to and covers transportation within the United States.

XIV.

The record made in the proceedings before the Commission contains no evidence tending to show the measure of the assailed rates or the allegedly preferential rates "insofar as the transportation took or takes place within the United States".

XV.

None of the complaints in the proceedings before the Commission alleges that the assailed rates were and are unlawful only in so far as transportation thereunder took or takes place within the United States.

[fol. 10]

XVI.

The order of the Commission, dated May 7, 1958, refers to the report dated the same day, and that report and the prior report in Docket No. 30846, 288 I.C.C. 793, are made a part thereof. The said order directs the defendants named in the five complaints to cease and desist, on or before August 14, 1958, and thereafter to abstain from, practicing the alleged undue prejudice and preference referred to in the report. It further directs the defendants named in the five complaints to establish, on or before August 14, 1958, upon notice to the Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the alleged undue prejudice and preference referred to therein. The order also vacated and set aside the order of May 25, 1953, in Docket No. 30846.

XVII.

On or about June 13, 1958, the plaintiffs herein filed a petition praying for the reopening of the proceedings for oral argument before and reconsideration by the Commission. That petition is reproduced as Appendix K, attached hereto and made a part hereof. Thereafter, and by orders dated July 2, 1958, July 29, 1958, October 21, 1958, and January 15, 1959, the Commission successively modified the effective date of the aforesaid order of May 7, 1958, to become effective March 26, 1959, upon thirty days' notice.

XVIII.

By order dated December 10, 1958, the Commission denied the said petition for reopening, reargument and re-
[fol. 11] consideration referred to in Paragraph XVII hereof. That order is reproduced as Appendix L, attached hereto and made a part hereof.

XIX.

By order dated February 19, 1959, the Commission further modified the said order of May 7, 1958, so as to

authorize that the action directed therein be effectuated upon not less than ten days' notice. That order is reproduced as Appendix M, attached hereto and made a part hereof.

XX.

On February 20, 1959, the plaintiffs herein filed a petition with the Commission under Section 1.101 of the Commission's General Rules of Practice for leave to file a petition seeking reopening of the proceedings for reconsideration and for vacation of the outstanding orders therein. That petition is reproduced as Appendix N, attached hereto and made a part hereof. At the same time plaintiffs herein also filed with the Commission a petition seeking the reopening of the proceedings for reconsideration and for the vacation of the outstanding orders. That petition is reproduced as Appendix O, attached hereto and made a part hereof. The Commission has not acted on these petitions as of the date of the instant complaint.

XXI.

Plaintiffs herein allege:

1. That the complaints are defective in that they assail combination rates from certain points in the Province of Quebec to certain destinations in the United States, made over United States ports of entry on or adjacent to the international boundary, and thus fail to state a cause of action over which the Commission has jurisdiction.

[fol. 12] 2. That the Commission lacked jurisdiction to entertain said complaints since it has no jurisdiction over combination rates made over ports of entry on or adjacent to the international boundary from points in Canada to points in the United States.

3. That the said order of the Commission dated May 7, 1958, as modified by the order of February 19, 1959, exceeds the statutory power of the Commission, is based upon errors of law, is not supported by evidence or adequate findings, and is unlawful, arbitrary, null and void for the following reasons:

a. The Commission exceeded its statutory power under Section 1(1) of the Interstate Commerce Act in assuming jurisdiction over common carriers engaged in transportation of property within a foreign country.

b. The Commission exceeded its statutory power under Section 1(2) of the Interstate Commerce Act in assuming jurisdiction over transportation within a foreign country and over rates and charges applying to such transportation.

c. The Commission exceeded its statutory power under Section 3(1) of the Interstate Commerce Act in promulgating an order which does not give the carriers an actual alternative of increasing the alleged preferential rates.

d. The Commission exceeded its statutory power in prescribing rates without finding that such rates will be just and reasonable as required under Section 15(1) of the Interstate Commerce Act.

e. The Commission exceeded its statutory power under Section 1, paragraphs (1) and (2), in prescribing rates for application to transportation taking place partly within a foreign country.

[fol. 13] f. The Commission failed to make (an essential) basic finding with respect to the measure of the assailed rates in so far as transportation thereunder takes place within the United States to support the ultimate conclusion that the assailed rates "insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of complainants' competitors in Official territory * * * ".

g. The Commission concluded that the assailed rates "insofar as transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of complainants' competitors in Official territory * * * " despite the absence of any evidence in the record showing the measure of the assailed rates in so far as trans-

portation thereunder takes place within the United States.

h. The Commission concluded that the assailed rates "insofar as transportation takes place within the United States, are and will be unduly prejudicial to the complainants * * *" despite the fact that none of the complaints allege that the assailed rates are unlawful only in so far as transportation takes place within the United States.

i. The Commission failed to state and find the measure of the allegedly preferential rates in so far as transportation thereunder took or takes place within the United States, and in failing to show the extent to which the preference found and stated in cents relates to and covers transportation within the United States.

j. The use by the Commission of the modifying clause, "insofar as transportation takes place within the United States", in each of the ultimate findings is arbitrary and baseless, the only apparent purpose of [fol. 14] which is to attempt to circumvent the limitations upon its jurisdiction expressed in Section 1 paragraphs (1) and (2) of the Interstate Commerce Act.

4. That the reports and orders constitute an abuse of the Commission's discretion and thus are unlawful in that the Commission abruptly departs from a settled principle of more than forty years standing which holds that the Commission's jurisdiction attaches at ports of entry or exit on or adjacent to the international boundary, but in less than six months thereafter reasserts and reverts to that principle. See Report on Reconsideration in Docket No. 31990, *Yellow Jacket Boat Company, Inc.* v. *Atchison Topeka & Santa Fe Ry. Co., et al.* (mimeographed), decided October 30, 1958.

5. That the reports and orders constitute an abuse of the Commission's discretion and thus are unlawful in that

the Commission departs from a settled principle of more than forty years standing and applied the charged concept retroactively.

XXII.

Plaintiffs will be irreparably damaged if said reports and orders are not permanently suspended, enjoined, set aside and annulled, and are without an adequate remedy at law.

XXIII.

WHEREFORE, plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission;

2. That this Court stay, restrain and suspend the operation of the orders of the Commission dated May 7, 1958, and February 19, 1959, pending the final hearing and determination of this action;

[fol. 15] 3. That a Court constituted as required by U. S. Code, Title 28, Sections 2284, and 2321-2325, consisting of three judges, of whom at least one ~~shall be a Circuit Judge~~, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants;

4. That said Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling the said orders of the Commission;

5. That plaintiffs have a recovery of the defendants of the proper costs of this suit; and

6. That the plaintiffs have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted,

Horace H. Powers, Railroad Terminal Building, St. Albans, Vermont, Attorney for Plaintiffs.

Of Counsel:

J. Raymond Hoover, Metropolitan Bank Bldg., Washington 5, D. C.

J. Edgar McDonald, 466 Lexington Avenue, New York 17, N.Y.

William H. Parsons, Colorado Building, Washington 5, D. C.

John F. Reilly, 230 Park Avenue, New York 17, N. Y.

[fol. 16] Verification by J. Edgar McDonald (omitted in printing).

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[fol. 17]

APPENDIX A TO COMPLAINT

LIST OF PLAINTIFFS

---

The Akron, Canton & Youngstown Railroad Compan
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
Canadian Pacific Railway Company.

The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 18] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road company
(Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
[fol. 19] Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company.
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company.

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company (Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

[fol. 20] Quebec Central Railway Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

[fol. 21]

APPENDIX B TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

---

COMPLAINT

Docket No. 30846

---

THERMOID COMPANY,
Southern Division

Complainant,

—v.—

The Baltimore and Ohio Railroad Company
Boston and Maine Railroad
Canadian Pacific Railway Company
The Central Railroad Company of New Jersey
The Chesapeake and Ohio Railway Company
The Dalaware and Hudson Railroad Corporation
Napierville Junction Railway Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
Norfolk Southern Railway Company
The Pennsylvania Railroad Company
Piedmont and Northern Railway Company
Quebec Central Railway Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
Seaboard Air Line Railroad Company
Southern Railway Company

Defendants.

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[fol. 22] The complaint of the above complainant respectfully shows:

That Thermoid Company, Southern Division is a corporation under the laws of Delaware, its principal office is located at Trenton, New Jersey, and its asbestos textile manufacturing plant being located at Charlotte, North Carolina. The business of the complainant is that of manufacturing, selling and distributing asbestos textile products. Among other things the complainant purchases asbestos crude and asbestos fibre, at Black Lake, Coleraine and Thetford Mines, P. Q. Canada, drawing the same into Charlotte, North Carolina, via all rail routes, in carload lots, and at Charlotte, North Carolina, manufactures into asbestos textile products and ships to all parts of the United States, including the States of Illinois, Indiana and Michigan.

II

That the defendants are as follows: Baltimore & Ohio Railroad Company; Boston & Maine Railroad; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chesapeake & Ohio Railway Company; Delaware & Hudson Railroad Corporation; Napierville Junction Railway Company; New York Central Railroad Company; New York, New Haven & Hartford Railroad Company; Norfolk Southern Railway Company; Pennsylvania Railroad Company; Piedmont & Northern Railway Company; Quebec Central Railway Company; Reading Company; Richmond, Fredericksburg and Potomac Railroad Company; Seaboard Air Line Railroad Company; Southern Railway Company; all of whom are common carriers and subject to the Interstate Commerce Act.

III

That complainant's plant was located in Charlotte, North Carolina, in 1919. Its supply of asbestos crude and asbestos [fol. 23] fibre as far as the supply was, and is, available has been purchased at mines located on the Quebec Central Railway, the principal movement originating at Thetford Mines, P. Q. Canada.

IV

That there is attached hereto a statement, identified as Appendix I, which sets out and describes in detail the one

hundred thirty six (136) carload shipments of asbestos crude and asbestos fibre, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, showing routes over which said shipments moved to Charlotte, North Carolina, the dates of the shipments, the car initials and numbers, the dates on which the charges assessed thereon were paid, the freight bill numbers and dates, the weights based upon which the charges were assessed, the rates at which the charges were assessed, and the freight charges paid thereon.

V

It is alleged that the rates on which the charges were assessed and charges collected for thereon as shown in Appendix I, was, is, and for the future will be unreasonable and unjust, in violation of Section 1 (4) of the Interstate Commerce Act.

In support of this allegation we cite rates to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., shown below:

| From: | Rates Asbestos | | | |
|---|---|---|---|---|
| | crude | | fibre | |
| Black Lake, ) | (1) | 120 | (1) | 92 |
| Coleraine, ) | (2) | 132 | (2) | 101 |
| Thetford Mines, P. Q. Canada ) | (3) | 137 | (3) | 105 |

[fol. 24] As compared with rates to Charlotte, N. C. see below:

| From: | Rates Asbestos | | | |
|---|---|---|---|---|
| | crude | | fibre | |
| Black Lake, ) | (1) | 158 | (1) | 121 |
| Coleraine, ) | (2) | 174 | (2) | 134 |
| Thetford Mines, P. Q. Canada ) | (3) | 178 | (3) | 137 |

(1) Rates in effect prior to 9/1/49 plus 6% of total freight charges (Ex Parte 168).

(2) Rates in effect 9/1/49 to 4/3/51.

(3) Rates effective 4/4/51.

(See Appendix II attached hereto.)

## VI

Appendix II attached hereto and made a part hereof, shows rates effective February 14, 1938, December 23, 1940, October 1, 1945, August 22, 1947, May 6, 1948, September 1, 1949, and present rates from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., Waukegan, Ill., and Newport, Vermont.

The statement also shows the same information to Charlotte, N. C. By reference to this statement it will be noted that the rates to all destinations, except Charlotte, N. C. only represents an increase of 11½ cents per 100 pounds on October 1, 1945, when compared with rates in effect February 14, 1938, whereas the rate from Newport, Vermont, to Charlotte, N. C., was increased 6 cents per 100 pounds or a total increase in the rate from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Charlotte, N. C., of 7½ cents per 100 pounds. The statement further shows that on February 14, 1938, the rate to Charlotte, N. C., exceeded the rate on asbestos fibre to Chicago, Ill., [fol. 25] Milwaukee, Wisc., and Waukegan, Ill., 15 cents, December 23, 1940, 17 cents, October 1, 1945, 21 cents, and present rate 32 cents.

The information shown above clearly shows that the rates to Charlotte, N. C., have been increased as indicated in Appendix H, no increase being made to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., except the increases granted in Ex Parte 162, 166, 168 and 175, which increases were also made in the rates to Charlotte, N. C.

## VII

Complainant is in competition with manufacturers located at Chicago, Ill., and other points in Official Territory. The manufactured products are shipped from Charlotte, N. C. to destinations in Official Territory, a large movement going to points in the States of Illinois, Indiana, and Michigan. Due to the great difference in the rates on the raw products inbound, and the fact that the outbound rates on the manufactured products are much greater from Charlotte, N. C., to destinations in Official Territory, than the manufacturers located in that territory, serves to place complainant at a great disadvantage.

Appendix III attached hereto and made a part hereof shows short miles, routes, present rates from Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., Waukegan, Ill., and Charlotte, N. C. The statement also shows per car, per mile and per ton mile revenue. By reference to this statement it will be noted that to Milwaukee, Wisc., for a distance of 1079 miles and Charlotte, N. C., a distance of 1080 miles shows the following:

| | | Revenue | |
|---|---|---|---|
| | *Per Car* | *Per Car Mile* | *Per Ton Mile* |
| | *(dollars)* | *(cents)* | *(mills)* |
| Milwaukee, Wisc. | 420.00 | 38.9 | 19.5 |
| Charlotte, N. C. | 548.00 | 50.7 | 25.4 |

[fol. 26] The above information shows that rail carriers receive $128.00 per carload of 40,000 pounds, per car mile of 11.8 cents and per ton mile of 5.9 mills greater revenue to Charlotte, N. C., than they receive on similar movements to Milwaukee, Wisc., a point equi-distant.

In June 1948 Southern rail carriers attention was called to the difference in the rates to Charlotte, N. C., as compared with rates to equi-distant points in Official Territory, and in April 1949 the Southern Freight Association, Atlanta, Ga., issued its submittal No. A-705 suggesting through commodity rates on asbestos crude and asbestos fibre, carload minimum weight 40,000 pounds to Charlotte, N. C., as follows:

| | Rates Proposed | |
|---|---|---|
| From: | Crude | Fibre |
| Black Lake, )<br>Coleraine, )<br>Thetford Mines, P. Q. Canada ) | 134 | 107 |

The submittal further provided the proposed rates would not be subject to Ex Parte 162, 166 increases.

Submittal A-705 was considered by the General Freight Committee of Southern Carriers at its September 1949 meeting and proposed rates approved. Subsequent to ap-

proval by Southern rail carriers, Submittal A-705 was considered by the Canadian Lines and disapproved.

During the past 14 years on request of complainant, Southern rail carriers have filed other proposals suggesting reduction in the rates on asbestos fibre, in carload lots from Quebec Central Railway origins to Charlotte, N. C., in order to place the rates to Charlotte, N. C., on a closer parity with similar rates maintained to destinations in Official Territory. However, on all of the proposals initiated by the Southern rail carriers, the Canadian and New England rail lines through their rate associations declined to concur in any reduction whatever to Charlotte, N. C.

[fol. 27] It is respectfully submitted that the above action by the Canadian and New England rail carriers through their rate associations, affords manufacturers located at Chicago, Ill., and other points in Official Territory, unduly and unjustly preferential treatment, and is prejudicial to complainant, located at Charlotte, N. C., in violation of Section 3 (1) of the Interstate Commerce Act.

## VIII

It is alleged that Thermoid Company, Southern Division, the complainant, Charlotte, North Carolina, on the shipments covered by Appendix I, paid and bore the charges, and that by reason of the unjust and unreasonable charges assessed on the involved shipments, as covered by Appendix I, has been damaged to the extent that the charges assessed and collected exceeded, exceeds, or may exceed such charges as would result from the application of rates in effect on date of movements to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., at carload minimum weight of 40,000 pounds or such other rate or rates as the Commission may find to be just and reasonable.

## IX

That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates, charges, etc., for transportation which were when exacted (1) unjust and unreasonable in violation of Section 1 (4) of the Interstate Commerce Act, and (2) unjustly discriminatory in violation of Section 2 and (3) unduly

preferential or prejudicial in violation of Section 3(1) of the Interstate Commerce Act.

PRAYER

WHEREFORE complainant prays that defendants may be required to answer the charges herein; that after hearing [fol. 28] and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of carload shipments of asbestos crude and asbestos fibre, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Charlotte, North Carolina, in lieu of the rates and minimum weights named hereinbefore, such other rates and minimum weights as the Commission deems reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged to have been paid in excess of rates maintained by defendants on asbestos crude and asbestos fibre, in carload lots, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., on date of movements involved in this complainant, the sum of $23,435.94 plus interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Also pay complainant by way of reparation on any additional shipments that may have moved two years prior to the filing of this complaint and not included in Appendix I, also that may move during the pendency of this complaint.

Respectfully submitted,

THERMOID COMPANY
Southern Division
By .....
H. V. FLEMING
Registered Practitioner

Dated at:
Charlotte, North Carolina,
P. O. Box 985,
This *21st* day of June, 1951.

[fol. 29]

APPENDIX C TO COMPLAINT

Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before Feb. 26, 1953

INTERSTATE COMMERCE COMMISSION

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No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

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*Submitted* *Decided*

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Combination rates on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, Province of Quebec, Canada, to Charlotte, N. C., not subject to Commission's jurisdiction. Complaint dismissed.

*H. V. Fleming* for complainant.

*Paul F. Robinson, J. A. Kane* and *J. Edgar McDonald* for defendants.

REPORT PROPOSED BY J. EDGAR SNIDER, EXAMINER

[fol. 30] Complainant is a corporation engaged in the manufacture, sale and distribution of asbestos textile fabrics with its manufacturing plant at Charlotte, N. C. By complaint filed June 22, 1951, it alleges that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte are unreasonable and in violation of Section 3 of the Interstate Commerce Act. The Commission

is asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period.

At the hearing on this complaint, defendants suggested, in view of the fact that the rates from the Canadian origins to Charlotte were combinations to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border, that the complaint should be limited to the rates from Newport to Charlotte on the ground that otherwise this Commission would be without jurisdiction. Complainant's counsel refused to limit the complaint to the Newport factor for the reason that the allegation of unreasonableness was based on the measure of the joint rates maintained by defendants from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. The examiner therefore directed that the complaint would be heard as drawn.

Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New* [fol. 31] *York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.

The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed.

[fol. 32]

APPENDIX D TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

*Submitted March 9, 1953* *Decided May 25, 1953*

Rates on crude asbestos and asbestos fibre, in carloads, from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte, N. C., found not shown to have been or to be unreasonable, but to be unduly prejudicial. Undue prejudice ordered removed, and reparation denied.

*H. V. Fleming* for complainant.

*Paul F. Robinson, J. A. Kane,* and *J. Edgar McDonald* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND KNUDSON BY DIVISION 3:

Exceptions to the examiner's proposed report were filed by the complainant. Our conclusions differ from those recommended by the examiner. Exceptions and suggested [fol. 33] findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant is a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile fabrics. By complaint filed on June 22, 1951, it alleges that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos

fibre from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte were and are unreasonable and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pedente lite*.

The assailed rates[1] are combinations of rates to and from Newport, Vt., a port of entry near the Canadian border. The rates from the Canadian origins to Newport are 33 cents on crude asbestos and 28 cents on asbestos fibre, minimum weight 40,000 pounds, and the rates from Newport to Charlotte on the respective commodities are $1.41 and $1.06, minimum 30,000 pounds.

At the hearing the defendants suggested that the complaint be limited to the rates from Newport to Charlotte on the premise that otherwise this Commission would be without jurisdiction. The complainant refused to so limit the complaint primarily because the allegations of unlawfulness were based in part on the measure of the joint rates maintained by some of the defendants and other rail lines on the same commodities from the same Canadian origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it [fol. 34] takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.

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[1] Rates are stated in amounts per 100 pounds, and are those in effect just prior to the general increases authorized on March 12, 1951.

Although the complaint does not specifically attack the rates from Newport to Charlotte separate and apart from the combinations of rates to and from Newport, both the complainant and the defendants introduced evidence relating to the rates from Newport. For example, the complainant compares the rate of $1.06 on asbestos fibre from Newport to Charlotte, 972 miles, with a rate of 72 cents, minimum 50,000 pounds, on woodpulp from Berlin, N. H., to Charlotte, 965 miles. Other rates on woodpulp from Berlin to various points in southern territory range from 66 to 89 cents for distances of from 804 to 1,575 miles. The rate of $1.06 is compared also with a rate of 81 cents, minimum 30,000 pounds, on flax mill waste or sweepings from Lee, Mass., to Pisgan Forest, N. C., 851 miles, and a rate of 73 cents, minimum 50,000 pounds, on logs, native wood, from Beecher Falls, Vt., to Hampton, S. C., 1,340 miles. At the time of the hearing all of these commodities were rated eighth class, in carloads, in the southern classification, but the complainant's witness had no knowledge of the average loadings or the movement, if any, under the compared rates.

Most of the asbestos fibre used by the complainant consists of No. 3 or spinning fibre, which has a value ranging [fol. 35] from about $320 to $525 per net ton, f.o.b. mines. It also receives an occasional carload of crude asbestos, which has a value of from $675 to $1,300 per ton. Very little evidence was introduced with respect to the rate on the latter commodity, except that certain unidentified rail carriers maintain a joint rate of $1.32, minimum 40,000 pounds, on crude asbestos from the Canadian origins to Milwaukee and Waukegan.

The rate on asbestos fibre from Newport to Chicago, Milwaukee, and Waukegan is $1.14, minimum 30,000 pounds, as compared with the rate of $1.06 to Charlotte. The rate of $1.06 from Newport to Charlotte is a commodity rate which is 10 cents less than the class-rate basis, whereas the defendants show that class rates generally apply to other destinations in southern territory. The defendants refer also to numerous proceedings before this Commission in which carload ratings higher than eighth class have been

prescribed or approved on various commodities with values within the range of those on asbestos fibres.

Numerous rail carriers, including some of the defendants herein, participate in joint international rates of $1.01 on asbestos fibre and $1.32 on crude asbestos, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. The short-line distances from Thetford Mines, for example, are 992 miles to Chicago, 969 miles to Milwaukee, and 1,019 miles to Waukegan, as compared with the short-line distances of 1,080 miles from Thetford Mines to Charlotte. Shipments to Chicago, Milwaukee, and Waukegan generally move over the lines of the Quebec Central Railway Company to Sherbrooke, Quebec, thence the lines of the Canadian Pacific Railway Company to Detroit, Mich., and the lines of connecting carriers beyond, for distances ranging from 1,000 to 1,143 miles to Chicago, from 1,071 to [fol. 36] 1,245 miles to Milwaukee, and from 1,085 to 1,209 miles to Waukegan.

In the sale of its products the complainant is in competition with manufacturers at Chicago, Milwaukee, and Waukegan, and the differences in the freight rates are an important factor in making sales.

The complainant contends that the foregoing rate adjustment results in undue preference of its competitors at Chicago, Milwaukee, and Waukegan, and in undue prejudice to it. In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combinations then in effect from the Canadian origins to Charlotte, but the proposal was disapproved by the Canadian lines. So far as appears, the service rendered in connection with this traffic to Charlotte is no greater or more expensive than that, on the average, to Chicago, Milwaukee, and Waukegan.

The defendants state that the rates from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan were originally made with relation to the rates from Sherbrooke, and that the rates from the latter point to these destinations reflected water-competitive conditions then existing on the Great Lakes. There is no evidence, however, that there is any current or prospective

water competition which might justify rates to Chicago, Milwaukee, or Waukegan on a lower level than to Charlotte.

The claim is made by the defendants also that the Canadian rail lines constitute a complete route from the Quebec origins to Chicago and Milwaukee, thereby controlling the rates to those points, and that the United States lines must join in those rates or forego the traffic. We cannot compel the Quebec Central or any of the other defendants to join in the establishment of joint rates from the Canadian origins to Charlotte. However, that carrier, which is a subsidiary of the Canadian Pacific[2], and the [fol. 37] latter carrier effectively participate in the rates to both Chicago, Milwaukee, and Waukegan, and to Charlotte. Newport is about 5 miles south of the Canadian border, and the Quebec Central and Canadian Pacific are the only rail carriers serving that point. Traffic therefrom to Charlotte must move for some distance beyond Newport on the Canadian Pacific before connection can be made with a United States carrier. It is thus within the power of the Canadian Pacific to put an end to the alleged undue prejudice by refusing to continue to participate in the joint rates to Chicago, Milwaukee, and Waukegan herein shown to be preferential, or, especially since the United States carriers appear to be willing, by reducing the rate to Charlotte. *Peters Cartridge Co.* v. *Director General*, 73 I.C.C. 311, 314.

The evidence is clear that the complainant's competitors at Chicago, Milwaukee, and Waukegan are being unduly preferred to the undue prejudice and disadvantage of the complainant. There is no showing, however, with sufficient particularity to warrant an award of reparation, that the complainant has been damaged by reason of any undue prejudice which may have existed in the past.

We conclude that the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic

[2] See *Lease of Line by C. P. Ry.*, 105 I.C.C. 575, 576.

from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered.

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[fol. 38]

APPENDIX E TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31683

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RAYBESTOS-MANHATTAN, INCORPORATED,
GENERAL ASBESTOS AND RUBBER DIVISION,

Complainant,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Defendants.

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COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from crude asbestos and asbestos fibre.

That complainant Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division, is a corporation incorporated under the laws of the State of New Jersey with its principal office at Passaic, New Jersey, with an asbestos textile manufacturing plant at North Charleston, South Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as com-
[fol. 39] mon carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada, to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to North Charleston, South Carolina, which are combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E.504, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official, Southern, and Western Territories in keen and [fol. 40] severe competition with manufacturers located in Official and Western Territories; and that both complainant and its competitors receive crude asbestos and asbestos fibre from mines named in paragraph III.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities

from the same mines to North Charleston, S. C.; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Office Territory and Western Territory points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing of asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos and asbestos fibre from mines named in paragraph III to North Charleston, S. C. and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 41]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein;

that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from the origins named in paragraph III hereof to North Charleston, S. C., in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that com-
[fol. 42] plainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D. C.
December 6, 1954.

RAYBESTOS MANHATTAN, INC.
By: A. R. Murphy, Traffic Manager
North Charleston, S. C.

E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

[fol. 43]

## Appendix No. 1.

### List of Defendants

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 44] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.

Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railway Company (Canadian National Railway Company, Lessee).
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
[fol. 45] Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Peter Duryee, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company
(Ferdinand J. Sieghardt, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
[fol. 46] The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation
(William E. Navin and Oscar O. Edlund, Trustees).

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.

St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

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[fol. 47]

APPENDIX F TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31,684

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THERMOID COMPANY,
SOUTHERN DIVISION
Complainant,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Defendants.

---

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from asbestos and asbestos fibre.

That complainant Thermoid Company, Southern Division, is a corporation under the laws of Delaware, its principal office being located at Trenton, New Jersey, and its textile asbestos manufacturing plant being located at Charlotte, North Carolina. The Thermoid Company, Southern Division, is also the complainant in Docket No. 30846 which has been reopened for further hearing by this Commission by order of July 30, 1954. The issues in Docket No. 30846 involve rates and charges assessed for the transportation of crude asbestos and asbestos fibre from mines located on the Quebec Central Railway Company in the Province of Quebec, Canada, to Charlotte, North [fol. 48] Carolina. The instant complaint involves published rates and charges on the same commodities from mines located on the Canadian National Railways in the Province of Quebec, Canada, which are in juxtaposition to and in competition with the mines located on the Quebec Central Railway Company in the same Province of Canada.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to Charlotte, North Carolina, which are combinations of commodity rates or combinations of com-

modity and class rates made over United States points, as shown in Canadian National Railways Tariff No. C. [ 1284, I.C.C. No. E. 504, as supplemented, New England Territory Railroads Tariff Bureau Tariff No. 47-E, Agent [fol. 49] C. R. Goldrich's I.C.C. No. 610, as supplemented and Trunk Line Territory Tariff Bureau Freight Tariff No. E-S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official and Southern Territories in keen and severe competition with manufacturers located in Official and Western Territories; and that complainant's competitors receive crude asbestos and asbestos fibre from mines named in paragraph III; and that complainant is entitled to have available to it said raw materials from such mines at reasonable, just, non-preferential and non-prejudicial rates and charges.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Charlotte, North Carolina; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and Western Territory points adjacent thereto.

VII

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates which are (1) unjust and unreasonable in [fol. 50] violation of section 1 of the Interstate Commerce Act, and (2) unduly preferential or prejudicial in violation of section 3 thereof.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from mines named in paragraph III hereof to Charlotte, North Carolina, in lieu of the rates and charges named in paragraph IV, such other rates and charges as the Commission may deem reasonable and just, and that such other and further order or orders be made as the Commission may consider proper in the premises.

THERMOID COMPANY
SOUTHERN DIVISION

By: E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

Dated at
Washington, D. C.
December 6, 1954

H. V. Fleming,
Registered Practitioner
P. O. Box 985
Charlotte, N. C.

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[fol. 51] APPENDIX No. 1

LIST OF DEFENDANTS

---

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Sante Fe Railway Company.

The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 52] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
[fol. 53] Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Peter Duryee, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.

The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company.
(Ferdinand A. Sieghardt, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
[Vol. 54] The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation
(William E. Navin and Oscar O. Edlund, Trustees).

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

[fol. 55]

APPENDIX G TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31685

---

UNION ASBESTOS AND RUBBER COMPANY

Complainant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Defendants.

---

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from crude asbestos and asbestos fibre.

That complainant, Union Asbestos and Rubber Company, is a corporation incorporated under the laws of the State of Illinois with its principal office at Chicago, Illinois, and its asbestos textile manufacturing plant at Marshville, North Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

[fol. 56]

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford

Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada, to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to Marshville, North Carolina, which are combinations of commodity rates or combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented, New England Territory Railroads Tariff Bureau Tariff No. 47-E, Agent C. R. Goldrich's I.C.C. No. 610, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official, Southern, and Western Territories in keen and [fol. 57] severe competition with manufacturers located in Official and Western Territories; and that both complainant and its competitors receive crude asbestos and asbestos fibre from mines named in paragraph III.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Marshville, N. C.; and

that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and Western Territory points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing of asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos and asbestos fibre from mines named in paragraph III to Marshville, N. C. and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 58]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

Wherefore complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made

commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from the origins named in paragraph III hereof to Marshville, N. C., in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall [fol. 59] determine that complainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D.C.
December 13, 1954

UNION ASBESTOS AND RUBBER COMPANY

By E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

H. V. FLEMING,
Registered Practitioner
P. O. Box 985
Charlotte, N. C.

[fol. 60] APPENDIX No. 1

LIST OF DEFENDANTS

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
[fol. 61] Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago North Shore and Milwaukee Railway.

Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company
(Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
[fol. 62] Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company.
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company
(Lewis D. Freeman, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
[fol. 63] The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.

Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

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[fol. 64] APPENDIX H TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31686

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CAROLINA ASBESTOS COMPANY,
Complainant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Defendants.

---

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products and other products manufactured from asbestos, viz, crude, fibre, refuse, shorts, waste, etc.

That complainant, Carolina Asbestos Company, is a corporation under the laws of North Carolina, its principal office and its asbestos textile manufacturing plant being located at Davidson, North Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by Railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

[fol. 65] That said defendants publish or participate in rates on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos, asbestos fibre, refuse, asbestos shorts, and asbestos waste from the mines named in paragraph III to Davidson, North Carolina, which are combinations of commodity rates, and combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, Canadian National Railways Tariff No. C. U. 128-4, I. C. C. No. E 504, as Supplemented, New England Territory Tariff Bureau Tariff No. 47-E, Agent C. R. Goldrich, I.C.C. No. 610, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official and Southern Territories in keen and severe com-[fol. 66] petition with manufacturers located in Official Territory; and that both complainant and its competitors receive crude asbestos, asbestos fibre, asbestos refuse, asbestos

shorts, and asbestos waste from mines named in paragraph III.

VI

That the rates on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Davidson, North Carolina; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from mines named in paragraph III to Davidson, North Carolina and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 67]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates

and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from the origins named in paragraph III hereof to Davidson, North Carolina, in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view [fol. 68] of the evidence to be adduced herein, the Commission shall determine that the complainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D. C.
December 13, 1954

Carolina Asbestos Company

By: E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

[fol. 69]

## Appendix No. 1

### List of Defendants

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
[fol. 70] Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.

Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

[fol. 71] The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company (Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company (Lewis D. Freeman, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
[fol. 72] Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

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[fol. 73]

APPENDIX I TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

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No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION v. BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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*Decided May 7, 1958*

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1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial.

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[1] This report embraces also No. 31683, Raybestos-Manhattan, Inc., General Asbestos & Rubber Division *v.* Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division *v.* Same; No. 31685, Union Asbestos & Rubber Company *v.* Same; and No. 31686, Carolina Asbestos Company *v.* Same.

Reparation awarded, and defendants required to remove the unlawfulness found to exist.

2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 I.C.C. 793, modified.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and H. V. Fleming for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and J. Raymond Hoover for defendants.

REPORT[2] OF THE COMMISSION

By the Commission:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and [fol. 74] the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N. Y., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 I. C. C. 793, division 3 found that the assailed rates had not been shown to have been or to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that

[2] On further hearing in No. 30846.

are or hereafter may be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding reopened for oral argument and reconsideration. Thereafter, upon petition of the complainant, the proceeding was reopened for further hearing which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and [fol. 75] unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charlston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are

unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important [fol. 76] commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste,

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-making [fol. 77] purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,* where it connects with the Canadian

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*By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

[fol. 78] Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November 1955, shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos, 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35[5], minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class 27.5, minimum 40,000 [fol. 79] pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport

[5] Class numbers represent percentages of the docket No. 28300 first-class rates.

to the same respective destinations, the class 35 rates are $1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are [fol. 80] manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through

international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. As- [fol. 81] bestos producers on the Quebec Central, on shipments to points in official territory, absorb these rates differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N. Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum

40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thefford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hanibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler [fol. 82] and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude

asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate 1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and [fol. 83] St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif., for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds.

The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months of 1955. In 1949 this complaint marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a [fol. 84] decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official-territory producers, and even there the competition is keen.

In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction

in these proceedings only over the rate factors applicable [fol. 85] southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories*, 299 I. C. C. 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina [fol. 86] destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the

latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear [fol. 87] alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I. C. C. 15. We have no jurisdiction to prescribe inter-

national rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to Canada [fol. 88] because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I.C.C. 637, division 5 stated, at page 639:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of

section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co.* v. *Grand Trunk W. Ry. Co.*, 129 I.C.C. 430, division 4 considered the reasonableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co.* v. *Chatham, W. & L.E.R. Co.*, 52 I.C.C. 145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N. Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I.C.C. 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.04 miles within the United States [fol. 89] to the Canadian border, the distance therefrom to the Canadian destination approximating 122 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 I.C.C. 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N. H. In *Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to Rouses Point, 1.1 miles, was performed by The Delaware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from [fol. 90] Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as an asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina

destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being un- [fol. 91] duly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston

on crude asbestos, minimum 40,000 pounds, of $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000 [fol. 92] pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds, on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will

[fol. 93] be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

CHAIRMAN FREAS dissents.

COMMISSIONERS MITCHELL and GOFF did not participate in the disposition of this proceeding.

[fol. 94]

## APPENDIX

| To— | Crude asbestos | | | | Asbestos fiber | | | |
|---|---|---|---|---|---|---|---|---|
| | From Danville, Quebec, Canada | | From Thetford Mines, Quebec, Canada | | From Danville, Quebec, Canada | | From Thetford Mines, Quebec, Canada | |
| | Short-line distance | Rates,[1] minimum 40,000 pounds | Short-line distance | Rates,[1] minimum 40,000 pounds | Rates,[1] minimum 40,000 pounds | Rates,[1] minimum 80,000 pounds | Rates,[1] minimum 40,000 pounds | Rates,[1] minimum 80,000 pounds |
| | *Miles* | *Cents* | *Miles* | *Cents* | *Cents* | *Cents* | *Cents* | *Cents* |
| Manville, N. J. | 480 | 68 | 521 | 97 | 68 | 61 | 86 | 79 |
| Ambler, Pa. | 529 | 68 | 570 | 97 | 68 | 61 | 86 | 79 |
| Chicago, Ill. | 907 | 103 | 987 | 132 | 85 | 77 | 101 | 93 |
| Kirkwood (St. Louis), Mo. | 1,118 | | 1,198 | | 97 | 87 | 114 | 104 |
| Richmond, Va. | 782 | | 823 | | 100 | 90 | 118 | 108 |
| Charlotte, N. C. | 1,042 | 150 | 1,083 | 154 | 134 | 131 | 134 | 131 |
| Davidson, N. C. | 1,031 | 149 | 1,072 | 152 | 134 | 131 | 134 | 131 |
| Marshville, N. C. | 1,068 | 152 | 1,109 | 156 | 136 | 133 | 136 | 133 |
| North Charleston, S. C. | 1,175 | 159 | 1,216 | 163 | 154 | 151 | 158 | 155 |

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 30,000 pounds beyond.

[fol. 95]

APPENDIX J TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1958.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

[fol. 96] These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 I.C.C. 793, are hereby referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

*It is ordered*, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

*It is further ordered*, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices [fol. 97] which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

*And it is further ordered*, That the order of May 25, 1953 in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 98]

## Appendix K to Complaint

### Before the Interstate Commerce Commission

### Docket No. 30846*

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Thermoid Company, Southern Division

— v. —

Baltimore & Ohio Railroad Company et al.

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### Petition of Defendants for Reopening and Reconsideration

Come now the defendants in the above-entitled proceeding, sometimes hereinafter referred to as petitioners, and respectfully ask the Commission to reopen the said proceeding for oral argument before and reconsideration by the entire Commission.

In support of their request, petitioners show:

### Résumé of the Proceedings

These proceedings embrace five complaints, four of which complaints were filed after the original disposition of the first complaint.

[fol. 99] The complaint on behalf of Thermoid Company, Southern Division (Docket No. 30846) filed June 22, 1951, assails the *combination* rates and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Char-

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685; and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

lotte, N. C. It alleges (Para. V) that those rates were and are unjust and unreasonable, in violation of Section 1 of the Act. The complaint states (Para. VII) that because of the difference in the rates on the inbound raw materials and the fact that the rates on the outbound manufactured products are much greater from Charlotte, N. C., to destinations in Official Territory than those of Official Territory manufacturers, the complainant is at a great disadvantage. It alleges in effect that the assailed rates to Charlotte are unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on 136 carload shipments forwarded during the period from June 23, 1949, to February 10, 1952, as well as during the pendency of the proceeding.

The complaint (Appendix No. 2) and the record (r. 35, 90) show that the assailed rates are not *joint* rates applicable from the Canadian origins to Charlotte, N. C., but *combination* rates applicable to and from Newport, Vt., a United States port of entry on or adjacent to the international boundary, and, for all practical purposes, an international border point.

At the beginning of the initial hearing, counsel for the defendants suggested (r. 4-5) that for jurisdictional reasons the complaint should be limited to an attack on the rate [fol. 100] applicable from Newport, Vt., to Charlotte, N. C. However, the practitioner representing the complainant refused to so limit the complaint and it was thereupon heard as drawn.

On brief the defendants reviewed the record only to the extent necessary to show the clear lack of jurisdiction of the Commission to pass upon the issues which it purported to present, and took the position that on the pleadings and the record the Commission should find that it was without

jurisdiction to pass upon the issues sought to be presented, and that the complaint should be dismissed.

The report submitted by Examiner J. Edgar Snider read in part:

"At the hearing on this complaint, defendants suggested, in view of the fact that the rates from the Canadian origins to Charlotte were combinations to and from Newport, Vt., *a port of entry to the United States on or adjacent to the Canadian border*, that the complaint should be limited to the rates from Newport to Charlotte on the ground that otherwise this Commission would be without jurisdiction. Complainant's counsel refused to limit the complaint to the Newport factor for the reason that the allegation of unreasonableness was based on the measure of the joint rates maintained by defendants from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. The examiner therefore directed that the complaint would be heard as drawn.

"Under Section I of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable for those rates only, or they may participate in joint through international rates and become [fol. 101] jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

"So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.

"The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed." (Emphasis supplied.)

The report of the Commission, by Division 3, 288 I.C.C. 793, stated:

"At the hearing the defendants suggested that the complaint be limited to the rates from Newport to Charlotte, on the premise that otherwise this Commission would be without jurisdiction. The complainant refused to so limit the complaint, primarily because the allegations of unlawfulness were based in part on the measure of the joint rates *maintained by some of the defendants and other rail lines* on the same commodities from the same Canadian origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. *They may publish rates to or from the border*, in which [fol. 102] event they are answerable only for those rates, *or they may participate in joint international rates* and thus become *jointly* and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (p. 794) (Emphasis supplied.)

Notwithstanding that clear statement, the report stated:

"The evidence is clear that the complainant's competitors at Chicago, Milwaukee, and Waukegan are being unduly preferred to the undue prejudice and disadvantage of the complainant. There is no showing, however, with sufficient particularity to warrant an award of reparation, that the complainant has been

damaged by reason of any undue prejudice which may have existed in the past." (p. 796)

Whereupon it stated:

"We conclude that the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered." (p. 796)

An order by Division 3, dated May 25, 1953, noted that Division 3, having found in its report that the assailed rates on crude asbestos and asbestos fibre from Black Lake, Coleraine, and Thetford Mines, P. Q., to Charlotte, N. C., were, and for the future would be, unduly prejudicial to ex-
[fol. 103] tent that they exceeded or might exceed the joint rates that were or thereafter might be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and to Milwaukee, Wis., and ordered the defendants to cease and desist, on or before August 1, 1953, and thereafter to abstain, from practicing the undue preference referred to in the order, and to establish, on or before August 1, 1953, upon statutory notice and thereafter to maintain and apply rates, regulations, and practices which would prevent and avoid the undue preference referred to in the order.

By petition dated July 31, 1953, the defendants sought the reopening, oral argument and reconsideration of the proceeding. Upon consideration of the record and of the defendants' petition, the proceeding was reopened for oral argument and for reconsideration by order of the Commission dated April 5, 1954. By a series of orders the Commission modified its order dated May 25, 1953, and eventually stayed the effective date thereof pending disposition of the matter.

Although the complainant had replied to the defendants' petition seeking the reopening of the proceeding and vigorously opposed the granting thereof, stating that

"the record in this proceeding covers all pertinent facts, circumstances, and conditions, and the reopening of this proceeding would unduly delay adjudication of the complaint",

the complainant, with complete disregard for the provisions of Rule 101 of the Commission's General Rules of Practice, by petition dated May 17, 1954, sought "the further reopening of this proceeding for the purpose of rehearing and further hearing".

By order of the Commission dated July 30, 1954, the proceeding was reopened for further hearing.

[fol. 104] The reopened proceeding was subsequently assigned for hearing with the four additional complaints involved in these proceedings.

The complaint on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683), filed on December 6, 1954, assails the *combination* rates applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to North Charleston, S. C. The complaint alleges that the complainant and its competitors receive crude asbestos and asbestos fibre from the specified origins. It alleges that the assailed rates to North Charleston, S. C., cause undue and unreasonable prejudice to the complainant, and undue and unreasonable preference and advantage to its competitors in Official and Western territories. The assailed rates are alleged to be unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins specified to North Charleston, S. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

The complaint on behalf of the Thermoid Company, Southern Division (Docket No. 31684), filed on December

6, 1954, assails the combination rates applicable on crude asbestos and asbestos fibre from Danville, St. Malachie, and Warwick, P. Q., to Charlotte, N. C. The complaint alleges that the complainant and its competitors receive crude asbestos and asbestos fibre from the specified origins, and that the assailed rates are excessive, unjust and unreasonable, unduly prejudicial to the complainant and [fol. 105] unduly preferential to its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act, respectively. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins named to Charlotte, N. C. No reparation is sought by that complaint.

The complaint on behalf of the Union Asbestos and Rubber Company (Docket No. 31685), filed on December 13, 1954, assails the *combination* rates and charges applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Marshville, N. C. The complaint alleges that both the complainant and its competitors receive crude asbestos and asbestos fibre from the Canadian origins named. It alleges that the assailed rates were and are unjust, unreasonable, unduly prejudicial to the complainant and unduly preferential of its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of this complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from the Canadian origins named to Marshville, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

The complaint on behalf of the Carolina Asbestos Company (Docket No. 31686), filed December 13, 1954, assails the *combination* carload rates applicable on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and as-

bestos waste, from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Davidson, N. C. It alleges tha [fol. 106] both the complainant and its competitors receive crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste, from the Canadian origins named. The assailed rates are alleged to be unjust, unreasonable, unduly prejudicial to the complainant and unduly preferential of its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts and asbestos waste, from the Canadian origins named to Davidson, N. C., and be required to make reparation on shipments forwarded during the statutory period preceding the filing of this complaint, as well as during the pendency thereof.

In the Report of the Commission decided May 7, 1958, the Commission found that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

The Commission further found that the rates on crude asbestos, asbestos fibre and asbestos refuse, shorts and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates by the specific amounts set forth therein.

[fol. 107] The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts,

and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

The Commission further found that the complainants in Dockets Nos. 30846, 31683, 31685, and 31686 were damaged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases therein found to have been just and reasonable.

The report specifically provided for the addition of the applicable general increases authorized on and subsequent to March 12, 1951, to all of the rates resulting from the findings therein.

## I

### The Report of the Commission Is in Error as to Matters of Law.

The legal principles involved in these proceedings are of such importance from the standpoint of both the Canadian and the United States lines affected thereby that they have no alternative but to seek reconsideration of the Report of the Commission in the hope that they may thereby avoid any necessity for court litigation with respect thereto.

[fol. 108] A. The report is in error on the issue of jurisdiction.

The petitioners have not heretofore challenged, nor do they here challenge, the jurisdiction of the Commission over common carriers which, within the United States, en-

gage in the transportation of international traffic, nor over the transportation of such traffic insofar as such transportation takes place within the United States.

The petitioners concede that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the transportation of persons and property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property, insofar as such transportation takes place within the United States. The basic issue to be decided is what constitutes transportation within the United States in a factual situation such as here exists.

It is also well settled by numerous decisions of the Commission and the courts that United States railroads have a clear alternative with respect to their participation in international traffic. They may publish reasonable and lawful rates applicable to and from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and become jointly and severally liable for any unlawfulness found in such rates. *Elliott Packing Co.* v. *Duluth, W. & P. Ry. Co.*, 292 I.C.C. 12, and *Thermoid Company, Southern Division* v. *Baltimore & O. R. Co.*, 288 I.C.C. 793. Petitioners continue to contend that United States ports of entry are, for all practical purposes, international border points and that having published rates on the involved commodities from East Alburgh and Newport, Vt., the ports of entry through which this particular traffic moves, they have complied with the first alternative above mentioned. They further contend that for the purpose of administer-
[fol. 109] ing the Interstate Commerce Act a reasonable and proper construction of the statute would require the Commission to hold, as it has for years, that the United States ports of entry are on or adjacent to the international border which are the nearest points to the border where the traffic can be interchanged between the United States and Canadian lines, for all practical purposes, in fact border points and that for the purpose of administering the Act insofar as it applies to common carriers and transportation subject to the provisions of the Act, its jurisdiction attaches

to such carriers and to such transportation at the ports of entry.

1. *History Of The Act.*

Prior to the enactment of the Transportation Act of 1920, the Interstate Commerce Act as amended by the Mann-Elkins Act which became effective June 18, 1910, applied, in the case of international traffic, to common carriers engaged in the transportation of passengers or property "from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

Although the Supreme Court had stated in *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 212, that "it would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries", the Commission itself admitted in *International Paper Co.* v. [fol. 110] *D. & H. Co.*, 33 I.C.C. 270, 273, that the first section of the Act did not in the same terms confer specific regulatory power on the Commission over rates from an adjacent foreign country to the United States as from the United States to an adjacent foreign country.

So far as the legislative history of the Transportation Act of 1920 indicates, the sole purpose for the change in the language of Section 1 made by that Act was to remove any uncertainty as to the regulatory power of the Commission in that respect.

When the Transportation Act of 1920 was under consideration in Congress, Mr. Edgar E. Clark, Member of

the Interstate Commerce Commission, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, First Session, and stated in part as follows:

> "The second change in section 1 is found at lines 12 and 13 on page 2 of the bill which makes the terms of the act applicable also to traffic 'from an adjacent foreign country to any place in the United States'.
>
> "For some reason that traffic is omitted from the provisions of the present act. It is not our thought that that will confer upon the Commission, or carry the terms of the act as applicable to jurisdiction over rates from specific places in an adjacent foreign country to places in the United States. *It is a general provision that* puts that transportation under the provisions of this act and *makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States,* and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the power to require the carrier operating within the United States to withdraw its concurrence from that [fol. 111] joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States." (Hearing on H. R. 4378, beginning with p. 10, July 15, 1919).

The Transportation Act of 1920 accordingly changed the language of Section 1 of the Act to provide for its application to common carriers engaged in the transportation of property "from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States", and also by providing that the provisions of the Act shall apply to the transportation of property "but only in so far as such transportation * * * takes place within the United States."

2. *Principles Of Statutory Construction.*

The principles of statutory construction which should govern the construction and interpretation of the clause of the statute which limits the jurisdiction of the Commission with respect to international traffic to common carriers and transportation taking place within the United States are few and simple.

Under a strict, literal, unrealistic, and impracticable construction of that part of Section 1 of the Interstate Commerce Act the jurisdiction of the Commission could be held to attach to common carriers and to the transportation of property at the very point of the international boundary, regardless of whether the boundary is located in the middle of the Detroit River, for example, or in a relatively undeveloped region. Under a practical, more realistic and reasonable construction of that language the jurisdiction of the Commission should be held to attach to United States common carriers serving the ports of entry on or adjacent to the international border, which are the nearest points to the border where the traffic can be [fol. 112] interchanged between the United States and Canadian carriers, and to the transportation of property between those ports of entry and interior points within the United States.

As the Commission itself observed in *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489, 493, every statute should be construed with reference to the object intended to be accomplished by it, and the statute should be given that construction best calculated to advance that object.

In *Piedmont & Northern Ry.* v. *Comm'n*, 286 I.C.C. 299, 311, the Commission itself stated that the Act was remedial legislation and should, therefore, be given a liberal interpretation.

In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126, 140, the Commission stated:

> "* * * The statute law which we administer in the regulation of rates is remedial in character, it is generally expressed in broad language, and it is to be broadly and liberally construed, having in mind the

purposes which it was intended to accomplish. *It is not difficult gradually to import into these provisions, by interpretation and precedent, a narrowness and rigidity which were not intended to be there. This we should guard against.*" (Emphasis supplied.)

It might be noted in passing that the construction by the Commission of the provision of the statute here under consideration obviously reflects the very narrowness and rigidity which the Commission itself has said it should guard against.

In *Construction of the Word "Deficit"*, 66 I.C.C. 765, 771, the Commission itself stated that the basic principle underlying all rules of statutory construction is that the [fol. 113] purpose, the intent of the lawmaker constitutes the law. It also stated (p. 771) the rule thoroughly established that if a word or phrase is susceptible of two constructions, one of which will effectuate the evident purpose of the statute and one of which is inconsistent or in conflict with that purpose, the former must control. Citing *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18.

In *Barrett* v. *Van Pelt*, 268 I.C.C. 85, 90-91, the Commission said:

> " * * * The intention of the law-maker constitutes the law. *Stewart* v. *Kahn*, 11 Wall. 493, 504. See *Smythe* v. *Fiske*, 23 Wall. 374, 380. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute. *Oates* v. *National Bank*, 100 U. S. 239, 244. Having found that the word 'damage' was intended to be used, the court applies the rule that, 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers.' *People* v. *Utica Insurance Co.*, 15 Johns, 358, 381; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212."

The Supreme Court itself has stated that all laws are to be given a sensible construction, and that a literal applica-

tion of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Palmer*, 3 Wheat. 610, 631; *United States* v. *Ryan*, 284 U. S. 167, 175. As a matter of fact, the Commission itself quoted that statement of principle in *S. H. Kress & Co.* v. *Agwilines, Inc.*, 246 I.C.C. 655, 657.

[fol. 114] Years ago the Commission itself observed that transportation is a very practical public service and that the laws for its regulation were intended to deal with actual rather than with constructive or imaginary things. *St. Louis Terminal Case*, 34 I.C.C. 453, 465.

In *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 234, the Supreme Court stated that in the exercise of its jurisdiction the Commission may and should consider the legitimate interests of the carriers and not just those of shippers and receivers using their services. It stated that the spirit and letter of the Interstate Commerce Act require that the Commission have in view the purpose of promoting and facilitating commerce and the welfare of all to be affected thereby, the carriers, as well as shippers and receivers.

3. *The Previous Construction By The Commission.*

Petitioners respectfully submit that the reasonable construction of the Commission's jurisdiction over common carriers engaged in transporting international traffic and over that transportation is one which has been recognized by the Commission itself and generally applied in situations of this kind almost from the date of the original enactment of the statute.

In *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203, 206, a proceeding incidentally involving rates on asbestos from Robertson, Thetford, and Sherbrooke, the Commission stated:

> "* * * we can not prescribe joint through rates from Canada into the United States, but *we can control the rates which the American lines charge from the ports*

*of entry in the United States to destinations in the United States,* whether they are joint rates or separately established rates applicable to the through transportation. *Our jurisdiction attaches at the ports* [fol. 115] *of entry in this country,* and consequently we may pass upon the complaint of unjust discrimination here made as if the traffic in question originated at Detroit and Port Huron." (Emphasis supplied.)

In *Big Basin Lumber Co.* v. *S. P. Co.*, 37 I.C.C. 730, the Commission was called upon to consider, among other things, the lawfulness of rates on lumber from a point in Mexico to destinations in the United States, subject to a three-way combination rate made up of a local rate to the Rio Grande, a bridge charge, and an American factor applicable from El Paso. The Commission there stated (p. 737) that it was without power to pass upon the reasonableness of the rate from Madera to El Paso. In other words, without saying so, the Commission was there finding that for all practical purposes El Paso was an international border point.

In *Arizona Lumber & Timber Co.* v. *A. E. R. R. Co.*, 96 I.C.C. 203, the Commission was called upon to consider rates on lumber articles from points in the United States when destined to points in Mexico. There again Waco and Nogales, Arizona, were treated, for all practical purposes, as international border points. The Commission stated (p. 206) that *the factor within the United States* had not been shown to have been unreasonable and conceded it was without power to award reparation with respect to the charges which accrued to the Mexican line.

In *Watab Paper Co.* v. *Canadian N. Ry. Co.*, 152 I.C.C. 265, the Commission was called upon to consider the lawfulness of rates on pulpwood from Vassar and Sprague, Manitoba, to Sartell, Minn. The report indicates that the Canadian National interchanged that traffic with the Great Northern at Warroad, Minn., "approximately 6 miles south of the Canadian border". There were no joint rates from Vassar and Sprague to Sartell. In its decision the Commission said:

[fol. 116] "The interstate commerce act applies to the lines that carry, and to the transportation of, shipments from the international boundary to destinations in the United States, and it is the duty of carriers to establish reasonable rates for that service. Where railroads in the United States and in Canada unite in the establishment of a *joint* through rate from a point in Canada to a destination in the United States, and the United States carriers fail to establish a rate for the movement from the international boundary, we have jurisdiction to determine the reasonableness of the *joint* through rate which shippers were compelled to pay, and to award reparation against the United States carriers participating in the transportation. *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179.

"Where the rates from a point in Canada to a destination in the United States is based on a combination of the rates to and from *a border point within the United States*, our jurisdiction ordinarily extends only to the rates within the United States." (p. 268)

According to the report (p. 265) Warroad, the "border point within the United States", is six miles south of the actual border. Although the report does not so specifically indicate, presumably Warroad was a United States port of entry.

In *Thannhauser & Co.* v. *Southern Pac. Co.*, 159 I.C.C. 747, a proceeding involving rates on paper-bag linings from San Francisco, Calif., to destinations in Mexico, the Commission treated Nogales, Arizona, as an international border point for all practical purposes, and stated that it was without authority over the Mexican factor and that the only question to be determined was whether *the American factor* was unreasonable.

In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, the Commission was asked to prescribe reasonable rates for the future on fruit from points in Florida [fol. 117] "to Rouses Point, N. Y., and other international border crossings" on shipments destined to Montreal. The Commission there stated (p. 524):

"The factor of the combination rate applicable *from Rouses Point at the border* to Montreal and used to make up the lowest combination basis is published and on file with us but is not subject to the provisions of the act." (Emphasis supplied.)

*M. Crelinsten & Sons* v. *Railway Exp. Agency, Inc.*, 201 I.C.C. 284, involved the lawfulness of the rates on strawberries from Florida origins to Montreal, Quebec, the United States ports of exit being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary." The assailed rates were joint international rates, but in passing upon the unreasonableness of the assailed rates the report shows that the Commission considered the combination of rates made over Rouses Point, N. Y., or Highgate Springs, Vt. It indicates that the assailed rates from the Florida origins were $5.18 and that the rate from Rouses Point to Montreal was $1.05, indicating according to the report that "the rates charged for that portion of the transportation within the United States were approximately $4.13", the difference between the assailed joint international rate and the rate from Rouses Point, the port of exit to Montreal. The report noted that practically all of the transportation north of Rouses Point and Highgate Springs was in Canada. It found the assailed rates unreasonable to the extent indicated therein for that portion of the transportation within the United States. The obvious practical effect of that finding was to consider and deal only with the measure of the charges applicable from the Florida origins to Rouses Point and Highgate Springs.

*E. J. Stanton & Son* v. *Atchison, T. & S. F. Ry. Co.*, 258 I.C.C. 315, involved rates on hardwood lumber from Los Angeles, Calif., to Canadian destinations. The report in- [fol. 118] dicated (p. 317) that no joint international rates were provided for application from Los Angeles to Trenton, Sarnia, Ont., and Weymouth, Nova Scotia. Rates applicable from Los Angeles to Port Huron, Detroit, Buffalo and Rouses Point apparently reflected the applicable American factor. The Commission then said (p. 318):

"These *rates to the border points* were published to apply on that port of the through transportation to destinations in Canada *which takes place within the United States.* Carriers may publish reasonable rates *applicable to the international boundary,* in which event they are answerable only for those rates. *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 491.". (Emphasis supplied.)

*Hoffman-Taff, Inc. v. St. Louis-S. F. Ry. Co.,* 279 I.C.C. 710, involved combination rates from Canadian origins to Springfield, Missouri, the first factors of which applied to Detroit and Port Huron, Michigan. In that proceeding the Commission stated (p. 712):

"On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on *Detroit and Port Huron,* which for all practical purposes are international-border points, applied. Only the Canadian rates, as factors of the through combinations, are assailed. The defendants operating within this country are not answerable for those rates, but only for *the rate from the border points to destination* and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction. See *Canada Glue Co.* v. *Canadian National Rys.,* 253 I.C.C. 801 (not printed in full)." (Emphasis supplied.)

*Dow Chemical Co.* v. *Alton & S. R.,* 284 I.C.C. 365, involved rates on ethylene oxide from Texas to Sarnia, [fol. 119] Ontario, Canada, the rates involved being based on combinations of rates to and from Port Huron. The Commission there held (p. 370) that in such instances it might determine only the lawfulness of the factor applicable to the haul within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co., supra.* According to the report, Port Huron is not on the international boundary but merely "the last station in the United States on the route of movement."

Admittedly, the Commission there awarded reparation on shipments to Sarnia "insofar as the transportation took place in the United States", but a careful reading and analysis of the report will indicate that what the Commission in fact did there was to award reparation on the Sarnia shipments by in effect finding unlawful the measure of the rate applicable to Port Huron.* That is obvious because the rates on which reparation was awarded reflect the rates to Midland, Mich., an American destination likewise involved in the complaint, and the rates to Port Huron, Mich., "the last station in the United States on the route of movement."

*Elliott Packing Co.* v. *Duluth, W. & P. Ry. Co.*, 292 I.C.C. 12, involved rates on shipments of horses from various Canadian origins to Duluth, Minn. The report indicates that combination of rates made over the international border applied without indicating whether the rates applied to and from United States ports of entry or to and from the actual international boundary. The report held (p. 13) that the Commission was without power to determine the applicability or reasonableness of the rates or charges from the Canadian origins to the border points, that transportation not being subject to the provisions of the Interstate Commerce Act.

[fol. 120] *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 U. S. 785, involved fresh fruits and vegetables from points in the South to Montreal, Que., the applicable rates being combination rates made over Rouses Point, N. Y. In that proceeding the Commission regarded Rouses Point, although south of the international boundary line, as "the international border" and said:

> "The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates

* As it had in the *Crelinsten* case, *supra*.

applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654. The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." (p. 787)

*Endicott-Johnson Corp.* v. *Akron, C. & Y. R. Co.*, 300 I.C.C. 373, involved rates on hides, including certain international rates, and there the Commission said.

"Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be confined to the rate factors for the movements within the United States." (p. 384)

[fol. 121] Northgate and Portal, N. Dak., both being within the United States, can hardly be precisely on the boundary line.

*Conrad Fafard, Inc.* v. *Canadian National Rys.*, 302 I.C.C. 163, involved shipments of straw from Canadian origins to United States destinations. In that report the following appears:

"The defendant Canadian National Railways appeared specially and moved that the complaints as to that carrier be dismissed for lack of jurisdiction. The shipments originated by the petitioner and by the other Canadian carrier defendant, the Canadian Pacific Railway Company, were interchanged with domestic carriers at either Port Huron or Detroit, Mich., which interchange points have been regarded by this Commission for all practical purposes as the international boundary. *Hoffman-Taff, Inc.* v. *St. Louis-*

*S. F. Ry. Co.*, 279 I.C.C. 710. The motion is granted, and the complaints as to these carriers are dismissed." (p. 163)

As a matter of fact that limitation on its jurisdiction was apparently recognized and conceded in the prior report in the title case, 288 I.C.C. 793, where the Commission stated:

"* * * Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; [fol. 122] *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (Emphasis supplied.)

4. *The Cases Relied On By The Commission.*

In rejecting the petitioners' contention that they had satisfied the first alternative hereinbefore referred to by publishing combination rates made over United States ports of entry in lieu of publishing joint rates for application on this traffic, the Commission concedes that although "in some instances" the Commission or divisions thereof "have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada", most of the cases have clearly indicated that its jurisdiction extends to or from the international boundary. Aside from the fact that the Commission has considered other ports of entry as much as six miles from the boundary as border points on traffic to or from Canada, the petitioners respectfully submit that the cases cited by

the Commission are either not in point or else are not inconsistent with or do not do violence to the construction of the statute contended for by them.

*Larrowe Milling Co.* v. *C., W. & L. E. R. R.*, 52 I.C.C. 145, involved a carload minimum weight applicable on shipments of dried beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey. It did not involve combination rates made over the international boundary or ports of entry south of the boundary. The statement there (p. 147) is that the extent of the Commission's jurisdiction as to traffic from Canada into the United States is limited to that portion of the haul performed within the United States.

*Simpson Co.* v. *G. T. W. Ry. Co.*, 129 I.C.C. 430, involved refrigeration charges on shipments of tomatoes [fol. 123] from Port Huron, Mich., to Toronto and Montreal. That proceeding did not involve combination rates made over the international boundary line or United States ports of entry south thereof. On the question of jurisdiction, the Commission merely stated (p. 431) that in numerous cases it had considered *joint* rates between Canada and the United States, found them unreasonable and awarded reparation against the United States lines for the full amount of the damages sustained.

*Newsprint Paper to Detroit*, 161 I.C.C. 637, involved the lawfulness of joint rates on newsprint paper from Canadian origins to Detroit, Mich. It did not involve combination rates made over the international boundary or United States ports of entry south thereof. In that proceeding the Michigan Central admitted its failure to publish a rate to apply to a two or three mile movement from the international boundary in the middle of the Detroit River to the point in Detroit at which the shipments were delivered was a violation of Section 6 of the Act, an admission which gave the Commission jurisdiction to determine whether the complainant had been injured by such violation and, if so, to award damages resulting therefrom.

As the Report of the Commission concedes, *Control of Hereford Ry.*, 99 I.C.C. 7, was an abandonment proceeding and not one concerned with the matter of rates.

*Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, involved rates on vegetables from Florida origins to Montreal, Que. Most of the rates involved in that proceeding were joint commodity rates and not combination rates made over United States ports of exit or Canadian ports of entry, or over the international boundary. In a few instances the involved rates were combination rates made over Rouses Point, N. Y. The jurisdictional issue raised in that proceeding was confined (p. 143) to the Commission's right to pass upon the lawfulness of the joint rates in [fol. 124] effect prior to December 6, 1932, and that proceeding merely held that the Commission had jurisdiction to determine the lawfulness of the joint rates applied, regardless of whether or not local rates as such were published and maintained for transportation within the United States to the Canadian border.

*Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, was a proceeding instituted on the Commission's own motion solely for the purpose of determining whether the Napierville Junction Railway was a common carrier subject to Part 1 of the Interstate Commerce Act. It did not involve the lawfulness of any rates, joint or combination, applicable on traffic transported by that carrier, and the Commission merely found the Napierville Junction Railway Company was not a common carrier subject to Part 1 of the Interstate Commerce Act.

*Iron Or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I.C.C. 515, was an investigation and suspension proceeding involving joint rates which the respondents proposed to publish for application on iron and steel wire from Black Rock and Buffalo, N. Y., to Kitchener, Ont. It did not involve combination rates made over the United States ports of exit or Canadian ports of entry, or over the international boundary. In that proceeding the respondents suggested that because the length of haul within the United States to the Canadian border was only 6.4 miles, compared with a haul of approximately 122 miles from the Canadian border to the destination, the Commission should not disturb the rates. The Commission merely held (p. 516) that it is the Commission's duty to determine

whether a rate published *jointly* with a foreign carrier was or is lawful where that issue is appropriately raised.

From the above it will be seen that none of the cases cited in the Report of the Commission is inconsistent with, or does violence to, the construction of the statute urged by the petitioners. Neither is there anything in *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. [fol. 125] 15, cited on Sheet 15 of the Commission's Report which would preclude the adoption of the construction of the statutory language urged by the petitioners. The initial report of the Commission in that proceeding, 278 I.C.C. 369, indicates (p. 371) that the proceeding involved joint rates applicable on refuse screenings and oat screenings from Vancouver, British Columbia, to destinations in California, Oregon and Washington, and that none of the shipments moved on combination rates made over international border points. In all instances the assailed rates were (p. 377) either joint rates or combination rates based on interior points in the United States.

The Report of the Commission on Reconsideration held (p. 18) that on the traffic there involved the United States defendants had elected to join in the publication of joint rates, and that as the charging of an unreasonable rate is a tort for which the parties to such rate are jointly and severally liable, the defendant United States carriers subject to its jurisdiction were liable for the full amount of any reparation due under the rates assailed.

The report of the Commission seems to imply that the decision in these proceedings does not represent a departure from any established principle laid down in prior decisions. That any such implication is wholly contrary to the fact is clearly established by the numerous cases hereinbefore cited which show that the Commission has heretofore consistently adopted the construction contended for by the petitioners in cases where the issue was raised. As a matter of fact, within the last seven months, the Commission has adhered to the construction contended for by the petitioners, as the reports in the *Endicott-Johnson* and *Conrad Fafard*, *supra*, cases plainly show, the former being a report by the entire Commission and the latter by Division 3.

[fol. 126] 5. *The Commission's Prior Concern Over This Issue.*

That the Commission itself has heretofore recognized the impracticality, if not the complete invalidity of the construction of the statute, now made in the instant report, as well as the absurd and impractical results such a construction must inevitably lead to, is clear from a review of some of its prior decisions.

In *Rates on Soda Ash and Other Commodities*, 28 I.C.C. 613, an investigation and suspension proceeding, the Commission was called upon to consider proposed increases in rates on soda ash from Wyandotte, Mich., to various destinations in Canada. In that report the Commission said:

> "It would seem that the underlying question in this case is how far this Commission should go in dealing with these rates from Wyandotte to Canadian points. Wyandotte is on the American side of the Detroit River, and the only movement of this commodity upon American soil is that to and upon that river. The bulk of the movement is in Canadian territory and subject to the jurisdiction of the Canadian commission." (p. 614)

The report also stated:

> "We are given jurisdiction over traffic from a point in the United States to a point in Canada, and we may undoubtedly act upon the American lines over which we have jurisdiction to a certain extent in case of such rates. It is doubtful if we could require our American lines to establish and maintain for the future a rate to Canadian points. We can require them to maintain rates which are now in effect until some affirmative action is taken by some Canadian line, over which we have no control, which prevents the continuance of those rates, or until the Canadian commission has [fol. 127] acted in the premises. And this, we think, is the course which should be adopted in the present instance." (pp. 614-615)

In *International Paper Co.* v. *D. & H. Co.*, 33 I.C.C. 270, the Commission was called upon to consider the alleged unlawfulness of joint rates on pulp wood from Canadian origins to destinations in New York. The report noted that the D. & H. received the traffic there involved from its Canadian connections at Rouses Point, N. Y., "about one mile south of the international boundary line", and that the New York Central received the traffic from its Canadian connection at Massena Springs, N. Y., "about 20 miles from the boundary line via the route of movement", although the air-line distance from Massena Springs to the boundary was about six miles.

The Commission noted (p. 273) that the first section of the Act did not in the same terms confer specific regulatory power on the Commission over rates from an adjacent foreign country to the United States as from the United States to an adjacent foreign country. It cited *T. & P. Ry. Co.* v. *I.C.C.*, 162 U. S. 197, as authority for the statement that its jurisdiction over carriers by railroad in the United States subject to the Act included all of their lines within the boundaries of the United States regardless of where the freight carried originated. However, the report stated that the Commission could not require the maintenance of joint rates from Canada into the United States, nor control the charges that carriers in Canada might make for transportation services in that country. It stated that the Commission might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States, in which event traffic would move on combination rates.

The report then continued:

> "Joint rates from and to Canada are a convenience to the public and to the carriers. They tend to pro- [fol. 128] mote easy and prompt movement of traffic and should be continued unless they are unreasonable or otherwise unlawfu.. *We do not conceive that merely because the rates are published as joint through rates we have power to determine what the railroads of Canada shall charge for transportation of freight to the border.*

"We think that in view of the fact that in practically every instance the entire increase accrued and accrues to the Canadian carriers for service performed within Canada, and of the further fact that the rates are published by Canadian carriers which are, therefore, primarily responsible for them, the Board of Railway Commissioners for Canada was the proper tribunal to pass upon the reasonableness of these rates. The Canadian Board's finding in a matter properly coming before it is entitled to weighty consideration. *The Canadian Board has held that it should not consider the reasonableness of joint rates from points in the United States to points in Canada, published by United States carriers and concurred in by Canadian carriers. It has taken the position that this Commission, having jurisdiction over the carriers primarily responsible for the making and publication of such rates, is the proper tribunal to consider the reasonableness thereof. Continental Prairie & Winnipeg Oil Co.* v. *C. P. Ry. Co.*, 13 Can. Ry. Cas., 156; *C. N. Ry. Co.* v. *G. T. Ry. Co.*, 10 Can. Ry. Cas., 139.

"The Canadian carriers and the Canadian Board have taken affirmative action with respect to the rates here under consideration. *Rates on Soda Ash and Other Commodities, supra.* The Canadian Board reached its decision after full hearing and due consideration. Under such circumstances we are not inclined to require the carriers subject to our jurisdiction to withdraw their concurrences in the rates." (p. 274) (Emphasis supplied).

[fol. 129] In *Payment of Charges in United States Currency*, 59 I.C.C. 263, an investigation and suspension proceeding involving the payment of charges in United States currency and the prepayment of charges on shipments into Canada, the Commission said:

"Our jurisdiction over transportation to or from a foreign country is limited to that part of the transportation which takes place within the United States. Interstate Commerce Act, section 1, paragraph (2);

International Paper Co. v. D. & H. Co., 33 I.C.C., 270. We can not, therefore, undertake to pass upon the proposed rules in so far as they affect charges for transportation beyond the borders of the United States, but will leave their validity and propriety to be determined under the laws in force where the transportation takes place." (p. 264) (Emphasis supplied).

*Cyanamid and Cyanide From Niagara Falls*, 151 I.C.C. 207; an investigation and suspension proceeding, involved the lawfulness of joint rates on cyanamid and crude cyanide from Niagara Falls, Ont., to various destinations in the United States. The Commission, by Division 4, found that the Commission was without jurisdiction in either a complaint or suspension proceeding to consider the lawfulness of *joint* rates or proposed *joint* rates between points in the United States and points in Canada, except (a) for the purpose of ascertaining damages sustained in consequence of a breach, by the carriers subject to our jurisdiction, of their statutory duty to make and publish just and reasonable rates applicable to that part of the transportation within the United States, and except (b) that it might require the carriers subject to its jurisdiction to establish and maintain for the future just and reasonable rates applicable to that part of the transportation within the United States.

[fol. 130] In reaching that conclusion the Commission relied on the decision of the Supreme Court in *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179. In its report the Commission said:

"It will be noted that the reparation which we awarded to the News Syndicate Company was for damages occasioned by the charging, by carriers subject to our jurisdiction, of an unreasonable rate for transportation only part of which was subject to our jurisdiction, and that the damages which the Supreme Court found that we had jurisdiction to award were for violation of the duties of carriers subject to our jurisdiction with respect to transportation wholly sub-

ject to our jurisdiction, that is, failure to publish a just and reasonable rate applicable to that part of the transportation within the United States.

"As we construe the language of the court quoted above *we may consider the lawfulness of an international joint rate only for the ascertainment of damages sustained in consequence of the breach by the carriers subject to our jurisdiction of their statutory duty to publish a just and reasonable rate applicable to that part of the transportation within the United States.* Accordingly it is our view that we are without jurisdiction to consider the lawfulness of an international *joint rate* for the future in either a complaint or suspension proceeding, except that we may require the carriers subject to our jurisdiction to establish and maintain for the future a just and reasonable rate applicable to that part of the transportation within the United States." (p. 212) (Italics supplied.)

In the Report of the Commission on Further Argument in *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, the Commission reviewed at some length its prior [fol. 131] decision and the decision of the Supreme Court in the *News Syndicate* case, and then said:

"We adhere to the view first expressed in *Black Horse Tobacco Co.* v. *I.C.R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. Or, they may become parties to joint rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a joint undertaking and participate in a rate which is an entity, in respect of such transportation, we entertain no doubt that our control over them empowers us to require them to

> cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility." (pp. 491-492)

The Commission also pointed out that no action had been taken by the Canadian Commission with respect to the rate situation there involved, and that the only action taken by the Canadian carriers, over which the Commission had no control, had been forced upon them by the proposed withdrawal by the United States lines of their concurrences in the existing rates. The report then said:

> "It would be unfortunate, indeed, for us to abandon a jurisdiction which is grounded upon such an impos- [fol. 132] ing line of our own decisions. The doubt we have heretofore entertained in respect of our jurisdiction over *joint* international rates has been as to our power to award reparation. The Supreme Court having affirmed our jurisdiction over that question in the *News Syndicate* case, it would be most unwise to surrender our regulatory power over such rates upon a doubtful construction of certain portions of that affirming decision. On the contrary, we believe the better course is to continue, as we have in the past, to exercise jurisdiction over the participation of United States lines in existing joint rates, or the propriety of such rates proposed as a substitute for existing rates. This will be our policy until we are compelled to abandon it by a decision of a court of competent jurisdiction on the direct question." (p. 493) (Italics supplied.)

In a concurring opinion, Commissioner Eastman concurred "in the results reached in this case, although not with all that is said in support of those results, so far as the jurisdictional question is concerned". Commissioner Eastman said:

Prior to the *News Syndicate case* we had asserted jurisdiction over the lawfulness of international rates under both sections 1 and 3, for the purpose of determining whether United States railroads should be required to cease and desist from participating in such rates if we found them to be unlawful, and in the latter event for the further purpose of determining whether the United States carriers should be required to pay reparation for damages suffered because of the tortious character of the rates. This doctrine clearly was not sustained in the *News Syndicate case*, although it may not have been wholly repudiated. The court there held that it is the duty of United States railroads, under section 1(5) and section 6(1) and (7) of the interstate commerce act, [fol. 133] to establish just and reasonable rates for service to or from the international boundary. For the breach of this statutory duty they are liable in damages. It is our duty to ascertain the damages sustained, and to this end we have jurisdiction to determine the reasonableness of the through international charges exacted, which a shipper has been compelled to pay because of the absence of rates to or from the boundary. It will thus be seen that the court did not hold that we can award damages because of the unlawfulness of international rates under section 1, which was the theory on which we had proceeded, but because of the breach of statutory duty involved in the failure to publish just and reasonable rates to or from the boundary. For this purpose we have jurisdiction to inquire, not into the lawfulness of international rates, but into their inherent reasonableness.

"From this reasoning of the court I think that it is permissible to infer that we are without jurisdiction over international rates as such, our only jurisdiction over international traffic being to see to it that the United States railroads publish lawful rates to or from the boundary for the portion of the transportation which is within this country, and to award damages because of any breach of this duty on their part. Under this theory, United States railroads would

be free to participate in joint international rates as they see fit, and such rates would not be subject to our tariff rules or to our regulation in any other respect. They could be used by shippers as alternatives to rates to or from the boundary, and our only jurisdiction would be to inquire into their inherent reasonableness for the purpose of ascertaining damages if shippers were compelled to pay them because of the absence of rates applicable solely to the transportation within the United States.

"But while this theory is a permissible inference from the court's decision, I find myself in difficulties [fol. 134] when I come to consider its logical results. If we have no jurisdiction over international rates as such, this is true under section 3 as well as under section 1. Let us suppose, then, that the international rate is too low, as sometimes happens, and relatively lower than corresponding rates within this country for which the same United States carrier is in whole or in part responsible. Let us suppose, also, that this low level of the international rate results in injury to some United States shipper. Manifestly the establishment of a lawful rate from the boundary would not abate this injury so long as the low international rate remains as an alternative which the Canadian shipper may use. Are we to hold that this is an injury for which no remedy exists? The only practicable remedy is an order requiring the United States railroad to cease and desist from participating in the objectionable international rate. Upon further consideration it seems to me that we must have jurisdiction to make such an order, for there is no other way of exercising effective control over that portion of the international transportation which takes place within the United States, of which we plainly have jurisdiction.

"The situation is not so clear under section 1 as under section 3, but even under section 1 the theory outlined above leads us into difficulties. I see no escape from the conclusion, if this theory be sound, that there may be alternative rates applicable to the same international movement; namely, a joint rate and

a combination rate on the boundary. This in itself is an unreasonable situation likely to prove embarrassing and even injurious to shippers. Upon consideration, it seems to me that the only way in which we can effectively exercise control under section 1 over that portion of the international transportation which takes place within this country is to provide that *United States railroads must either maintain just and rea-* [fol. 135] *sonable rates to and from the boundary, in which event they must not participate in alternative joint rates, or they must be parties to just and reasonable joint rates, in which event they need not maintain rates to and from the boundary because to do so would be a vain and useless thing.* Whether or not such an interpretation of our statutory powers and of the statutory duties of the United States carriers is consistent with the *News Syndicate case* I am not sure; but in all events there is sufficient doubt upon the point to warrant us in giving the Supreme Court an opportunity to consider further the subject of international rates." (pp. 500-502) (Emphasis supplied.)

Of significance also is the dissenting opinion of Commissioner Meyer, concurred in by Commissioner Woodlock, which read in part as follows:

"I can not concur in reversing division 4 for reasons stated in the original report of the division, 151 I.C.C. 207. In my judgment, what it is now proposed to do can not be done without performing one or more of the following unlawful acts:

1. *To legislate for a foreign country* by—

2. *Passing upon the reasonableness of rates in a foreign country when we have no authority to take evidence and to inform ourselves regarding the facts customarily relied upon in establishing reasonable rates.*

3. *To carry into a foreign country our United States standards of reasonableness and to apply them there.*

"Situations like those presented by the instant case can be fully met, without raising doubtful legal and

constitutional questions, *by requiring carriers to publish rates to and from international boundaries.*" (p. 503) (Emphasis supplied.)

[fol. 136] *Newsprint Paper Investigation*, 197 I.C.C. 738, was an investigation and suspension proceeding involving rates on newsprint paper, including joint rates, from Canadian origins to destinations in the United States. In the portion of that report devoted to the joint international rates there involved the following appears:

"The position of the Canadian carriers may be summarized as follows:

"Before either the Canadian board or this Commission was instituted there were joint international rates, some of the known ones dating back as far as 1874. These rates, they contend, were established under the right at common law of the two groups of carriers to contract with one another for the transportation of traffic in through cars and at through rates; and, it is argued neither our act nor the Railway Act of Canada destroyed the right of the carriers to make such contracts. As to the regulatory power of either commission they state that:

> In the final analysis, the jurisdiction of each commission rests in prescribing rates to or from the international boundary which, under all the circumstances and conditions in their respective countries, are just and reasonable. When, therefore, the Canadian and American carriers join together in publishing rates which are lower than either commission could find reasonable if based on the sum of the locals to and from the boundary, it is obvious that neither commission can enforce still lower rates in which the two sets of carriers shall join, if the carrier in the foreign country, over which such commission has no jurisdiction, declines to be bound by such rate. That is the situation in its broad aspect.

"They state that no serious difficulty in regard to international rates has arisen in Canada for the reason

that, moved by a realization that such rates, made for [fol. 137] the express purpose of fostering international trade, are generally lower than Canadian local rates or combinations on the boundary and that, because of its lack of jurisdiction over participating American carriers, any interference therewith probably would result in higher rates, the Canadian board has dismissed applications for reductions therein. They also state that the Canadian board has not adopted the practice of issuing cease-and-desist orders prescribing maximum rates in which Canadian carriers may participate." (pp. 774-775)

And:

"Maintenance of reasonable and nonprejudicial rates between the two countries is admitted by all parties to be a matter of the greatest importance and both the carriers and the shippers generally urge that we take no action which would compel or lead to the cancelation of *joint international rates* on newsprint. *Until we have a mandate from Congress or an interpretation by the courts of the present law necessitating a different course, we shall continue in the view that we should proceed with great caution in an effort to avoid any action which would tend to complicate or hinder the free movement of international traffic.*" (p. 776) (Emphasis supplied.)

And:

"Having in mind that the establishment of fair relations involves, to a certain extent, an evaluation of the service from Canadian producing points to the border, we will not at this time suggest what might appear to us to be proper joint through international rates or prescribe rates from the boundary for application on international traffic, but shall defer further consideration of the international rate situation *pending such action as the Canadian board* may consider appropriate and pending revision of the carriers' proposals as to [fol. 138] international rates in order to bring them

into reasonable harmony with the prescribed domestic bases." (p. 777) (Emphasis supplied.)

*Consolidated Stone Cases*, 200 I.C.C. 65, embraced a major portion of the stone rate adjustment east of the Rocky Mountains, together with *joint* rates from origins in Official Territory to destinations in the Canadian provinces, Ontario and east. In its report in that proceeding the Commission said:

> "It would appear that the rates to points in Canada are as much in need of revision as the rates within the United States. However, we do not have jurisdiction to prescribe joint rates for future application from points in the United States to points in Canada, and the only method open to us of preventing the application to such transportation of joint rates which are found to be unlawful under the act is to require the lines of the *United States to discontinue their concurrence therein. In the present state of the record we are not warranted in making specific findings which might ultimately lead to such drastic action.* On the contrary, it would appear that the most that should be done at this time is to suggest that rates from official territory to that portion of Canada here considered should be revised in appropriate relation to the basis approved herein for application within official territory." (pp. 113-114) (Emphasis supplied.)

*Inland Empire Paper Co.* v. *Great Northern Ry Co.*, 219 I.C.C. 501, involved the lawfulness of rates on newsprint paper, including certain *joint* international rates. In discussing international rates in that proceeding the Commission said:

> "* * * we observed in the *Newsprint* case, *supra*, page 776, that maintenance of reasonable and non-prejudicial rates between Canada and the United States was admitted by all of the parties therein to be a [fol. 139] matter of the greatest importance, and both the carriers and the shippers in that case urged that no action be

taken which would compel or lead to the cancellation of joint international rates on newsprint. We there said that until we have a mandate from Congress or an interpretation by the courts of the present law necessitating a different conclusion, we shall continue in the view that *we should proceed with great caution* in an effort to avoid any action which would tend to complicate or hinder the free movement of international traffic." (p. 511). (Emphasis supplied.)

6. *The Complete Practicality Of The Construction Contended For By Petitioners.*

International traffic coming into the United States moves through established ports of entry, some of which are coastal ports through which water-borne traffic moves to or from foreign countries. In the case of traffic from adjacent foreign countries, such traffic moves through ports of entry located either on the Great Lakes or at interior land points located a reasonable distance from the actual international boundary line. All such ports of entry are essential for Customs purposes. In addition, the ports of entry through which all-rail traffic to or from adjacent foreign countries moves serve as points where foreign lines, Canadian or Mexican, interchange traffic with United States lines.

Petitioners have heretofore shown that some Canadian traffic is interchanged at Rouses Point, N. Y., a port of entry located less than one-half mile from the international boundary. Yet, because the petitioners publish rates to and from that port of entry, which for all *practical* purposes is the international boundary so far as the importation of traffic by railroad is concerned, the Commission would hold [fol. 140] that a rate applicable from a point in Canada to a point just within the United States, no matter how close to the actual boundary line, would give it jurisdiction over the transportation as well as over the Canadian line performing that transportation.

The only apparent alternative the petitioners might have would be either to attempt to interchange all traffic at the exact international boundary, or to publish rates applicable to and from the exact international boundary. They have

heretofore shown that it would not be practicable or feasible to interchange traffic at the exact international boundary, but the Commission dismisses that practical consideration with the indifferent comment that it does not perceive how that would affect the situation. Neither would it be practicable to publish rates between interior points in Canada and the exact international boundary, on the one hand, and points between the exact international boundary and interior points in the United States, on the other. As the Commission well knows, the carriers rarely, if ever, publish rates for application to or from a point on a line of railroad where there are no facilities for the receipt, delivery, or interchange of traffic. Any departure from that practice could only result in complicated, confusing, and possibly doubtful or ambiguous tariff provisions. If the Canadian and American carriers continue to interchange traffic at the established ports of entry under the Commission construction of the statute in order to deprive the Commission of jurisdiction in any instance where the carriers elect not to join in joint international rates, it will be necessary for them to publish rates to and from the exact boundary line. In the case of traffic moving through the Rouses Point port of entry, for example, the Canadian National Railways would have to publish a joint rate for application from the actual international boundary to Charlotte, N. C., although it would participate in that rate only to the extent of a haul of less than one-half mile to Rouses Point, where the traffic [fol. 141] would thereupon be interchanged with its United States connection. Similarly absurd tariff and routing provisions would result in the case of any and all traffic moving via any other port of entry.

The petitioners have already shown that the Commission construction of the statute could not fail to result in conflict between the Canadian Board of Transport Commissioners and this Commission as to their respective jurisdiction over international traffic.

The attitude of the Canadian Government is indicated in a report of the Royal Commission on Transportation of Canada to Parliament, dated February 9, 1951, where, speaking both as to the Board of Transport Commissioners

for Canada and the Interstate Commerce Commission, it was observed:

> "The Board controls the rate over such portion of the through rate as lies within Canada and the Commission controls the rate over the portion in the United States.
>
> "The legal jurisdiction over such rates is thus divided, neither country having complete control over the entire rate in an international rate tariff." (p. 102.)

It should be noted that there are no known decisions of the Canadian Board of Transport Commissioners which held that the provisions of the Canadian statutes attach to a United States carrier entering Canada merely for the purpose of interchanging traffic with Canadian railroads.

On the other hand, the construction of the statute contended for by the petitioners would create no such interchange, tariff publication, or conflicting jurisdictional problems. It would permit Canadian lines to continue to interchange traffic with American lines at United States ports of entry, without thereby making themselves United States carriers subject to the provisions of the Interstate Commerce Act or giving the Commission jurisdiction over [fol. 142] the entire transportation regardless of the infinitesimal portion thereof performed by Canadian carriers in moving the traffic the slight distance between the international boundary and the various United States ports of entry. It would obviate any necessity for endeavoring to circumvent this Commission's jurisdiction by the highly impractical means of attempting to interchange traffic at the exact international boundary, or, in the alternative, publishing rates for application to the exact international boundary regardless of the complicated tariff situation which would inevitably result.

The following language of Justice Frankfurter in *United States* v. *Monia*, 317 U. S. 424, 431-432, seems particularly significant and appropriate here:

> "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine

of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice, e. g., *United States* v. *Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning."

[fol. 143] The Commission itself has up to this time been reluctant, if not entirely unwilling, to adopt the construction of the statute which it now does. Under the Commission construction of the statute the petitioners are in effect found to have failed to comply with their statutory obligation to publish just and reasonable rates for application from the international boundary to the involved destinations, and for the breach of that statutory duty to be liable for the resulting damages, if any. Under the petitioners' construction of the statute there would be no breach of their statutory duty and consequently no liability for damages.

The rule is thoroughly established that language is susceptible of two constructions, one of which will effectuate the evident purpose of the statute and one of which is inconsistent or in conflict with that purpose, the former must control. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18.

The respondents respectfully submit that the Commission's failure to find that these complaints presented issues which it lacked jurisdiction to consider was error of law, which requires reconsideration and reversal.

B. THE REPORT IS IN ERROR AS TO THE JURISDICTION OF THE COMMISSION OVER CANADIAN LINES.

The Interstate Commerce Act admittedly gives the Commission jurisdiction over all common carriers engaged in the transportation of property by railroad insofar as such jurisdiction takes place within the United States. To the extent that any Canadian line operates within the United States beyond the United States ports of entry, the petitioners have heretofore conceded that those lines have for all practical purposes thereby become United States common carriers subject to the Act and to the jurisdiction of the Commission. However, simply because Canadian lines may be subject to the provisions of the Interstate Commerce [fol. 144] Act to the extent that they operate within the United States south of United States ports of entry, it does not follow that this Commission automatically has unlimited jurisdiction over those carriers and can effectively control, directly or indirectly, that portion of their operations which takes place wholly within Canada.

The territorial jurisdiction of the Commission extends to the international boundary line, at which point that of Congress itself halts. The Commission's territorial jurisdiction as to foreign commerce is thus co-extensive with that of the Federal Government. No act of Congress has force of law beyond that boundary line. *International Nickel Co.* v. *Director General*, 66 I.C.C. 627, 629. As the Commission said in *Cyanamid and Cyanide from Niagara Falls*, 155 I.C.C. 488 (p. 490):

> "The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a foreign country,' and to common carriers engaged in such transportation, '*but only in so far as such transportation takes place within the*

*United States.* Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country." (Emphasis supplied.)

As the defendants have shown in that portion of this petition under subdivision "A", the Commission heretofore has consistently indicated in similar instances that it has no control over the Canadian carriers.

In *Cyanamid and Cyanide from Niagara Falls, supra*, the Canadian carriers which entered the United States to effect interchange of the traffic with United States carriers were pointedly described (p. 492) as "Canadian carriers over which we have no control."

[fol. 145] In *Michelson v. Canadian National Rys.*, 256 I.C.C. 57, the Canadian line interchanged Canadian originated traffic with the Maine Central Railroad at Vanceboro, Me., the interchange being made south of the international boundary. The jurisdictional question was raised by the Canadian defendant, and the Commission awarded reparation (p. 60), against the United States carriers only. That the term "United States carriers" was not applicable to the Canadian defendant is shown by the omission of the Canadian defendant from the list of carriers set out in the corrected reparation order of the Commission in that proceeding, dated December 11, 1944.

In *Carstens Packing Co. v. Great Northern Ry. Co.*, 264 I.C.C. 164, the second corrected supplemental order of the Commission, dated April 11, 1949, eliminated the Canadian Pacific Railway which had been named in a prior order.

*W. C. Reid & Co. v. B. & M. R. R.*, 276 I.C.C. 397, was a discrimination proceeding in which the Canadian National Railways was a defendant interchanging traffic at Vanceboro, Me. While holding that when carriers subject to its jurisdiction voluntarily joined in rates between points in the United States and points in Canada the Commission may require the *United States carriers* to abstain from joining in the maintenance of such rates on any basis other than that found lawful, the Canadian National Railways was not regarded as a "United States" carrier,

and was not named in the order directing the removal of the discrimination found in that proceeding.

*Mayo Shell Corp.* v. *B. & O. R. Co.*, 293 I.C.C. 77; 297 I.C.C. 133, involved traffic moving from Houston, Texas, to points in Canada on combination rates made over the border. While the reports do not clearly so indicate, the probabilities are that the combination rates referred to were made over ports of entry rather than over actual border points. In any event, the report of the Commission significantly noted that, while a portion of the transporta-
[fol. 146] tion under the assailed rates accrued in Canada and several of the defendants were Canadian carriers, the Commission had jurisdiction only over such of the transportation as took place within the United States. Its order accordingly was directed only against the defendant carriers engaged in that transportation and omitted the Canadian defendants.

In *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co., supra*, cited in the Commission's report in these proceedings, the Commission cited (p. 15) *Cyanamid and Cyanide from Niagara Falls, supra*, which omitted Canadian carriers from the order of the Commission, although interchange was effected at a point below the international boundary characterizing such carriers as "Canadian carriers over which we have no control."

Despite its previous clear admissions that in instances of this kind the Commission has no authority over the Canadian lines, this report of the Commission amounts to an assertion of jurisdiction over the Canadian carriers merely because those lines crossed the international boundary line for the sole purpose of interchanging the shipments with their United States connections at the several United States ports of entry, those ports of entry being only slight distances south of the actual boundary line between Canada and the United States, and being the points nearest to the actual boundary where interchange can be effected. Such a technical construction of the statute cannot be justified as a matter of law. It amounts to an assertion of the jurisdiction of this Commission over Canadian carriers and authority to regulate indirectly jurisdiction which takes place wholly within Canada.

C. THE REPORT AND ORDER OF THE COMMISSION AMOUNT TO THE PRESCRIPTION OF THROUGH INTERNATIONAL RATES.

The Report of the Commission concedes, as it must, that the Commission has no jurisdiction to prescribe international rates for application partly within Canada. The In- [fol. 147] terstate Commerce Act does not empower the Commission to prescribe or regulate joint international rates. It applies to international commerce only in so far as the transportation takes place within the United States. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654. Whatever power Congress may have to regulate the conduct of United States railroads doing business abroad, by the limiting provisions of the Transportation Act of 1920, it expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries. Having expressed that purpose it certainly cannot be argued that Congress had by implication granted the Commission any power to regulate the conduct of foreign carriers and rail transportation in foreign countries. *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, 621.

Notwithstanding the concession in the report that the Commission has no jurisdiction to prescribe international rates for application partly within Canada, the Commission nevertheless has undertaken to do exactly that. The report not only finds that the assailed rates were and are unjust and unreasonable, but that they are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory. The finding of unjustness and unreasonableness relates to past shipments, and it is significant that the report is silent as to the rates which will be just and reasonable for the future, either from the Canadian origins involved, the actual international boundary line, or the United States ports of entry adjacent thereto which, for all practical purposes, should be considered as border points between Canada and the United States.

But the report further finds that the assailed rates are and will be unduly prejudicial to the complainants and unduly preferential to the complainants' competitors in Official Territory to the extent that the assailed rates from the several Canadian origins to the several southern desti-

nations exceed or may exceed the rates to Ambler, Pa., [fol. 148] and destinations taking the same rates, by specified amounts. That finding necessarily relates to the present and future, and it is equally significant that the report is silent as to whether the assailed rates were unduly preferential or prejudicial in the past.

Petitioners respectfully submit that the qualification of both findings by the restrictive clause taken from the statute, namely, "in so far as the transportation takes place within the United States" is nothing more than a superficial attempt on the part of the Commission to legalize findings which otherwise would be clearly unlawful.

The order of the Commission, dated May 7, 1958, which referred to the report in these proceedings and to the prior report in the title proceeding and made them a part thereof, noted that the Commission had in its report found the rates in question are and for the future will be unduly prejudicial to the complainants and unduly preferential to the complainants' competitors to the extent indicated in that report, and orders the defendants to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue preference and prejudice referred to. It further orders the defendants, according as they participate in the transportation within the United States, *to establish, on or before August 14, 1958, upon not less than thirty days' notice to the Commission and to the general public, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the order.* The petitioners respectfully submit that the order referred to amounts in effect to a prescription by the Commission of international rates which may lawfully be applied for the transportation of various types of asbestos moving from origins in Canada to destinations in the United States. The petitioners respectfully submit that the order is clearly a prescription of international rates in direct conflict with the Commission's admitted lack of "jurisdiction to prescribe rates for application partly [fol. 149] within Canada", and that the qualifying clause in the order directing compliance therewith by the defendants "according as they participate in the transportation

within the United States" is nothing more than a futile effort to circumvent the statutory limitation on the power of the Commission by attempting to accomplish by indirection what the Commission clearly cannot do directly.

Even if, contrary to the contentions hereinbefore made by the petitioners, the Commission has jurisdiction to consider the assailed rates, the extent of the Commission's authority would be limited to the issuance of a cease and desist order requiring the United States carriers to discontinue the maintenance of rates properly found to be unlawful with respect to transportation wholly within the United States.

By fixing the exact measure of the rates which may lawfully be applied on this traffic from Canadian origins to southern destinations in the future, the Commission is prescribing rates on international traffic, and that it cannot do.

D. THE REPORT IS IN ERROR IN APPLYING A CHANGED CONCEPT OF COMMISSION JURISDICTION RETROACTIVELY.

The cases hereinbefore cited show beyond question that the Commission has consistently construed the Interstate Commerce Act as limiting its jurisdiction to rates which the United States lines publish and charge from or to ports of entry or exit located in the United States on or adjacent to the international border which are the nearest points to the border where the traffic can be interchanged between the United States and Canadian lines. It has consistently held that it has no jurisdiction over a Canadian factor of a combination rate even though that factor applies to the port of entry located on American soil.

The decision herein represents an extreme and abrupt departure from a settled administrative construction of the [fol. 150] Act. It is an established principle that "settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons" *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commn.*, 200 U. S. 361, 401; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Interstate Commerce Commn.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178.

This is particularly so where, as here, the carriers have for many years relied upon the Commission's construction of the statute and established and published their rates in the same manner and form as the rates in the instant case. *U. S.* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13-14.

Nor does the report of the Commission give any cogent reasons for the extreme and abrupt departure from the settled administrative construction of the Act. But even if the report did give cogent reasons for such departure, it would be entirely improper to give that departure retroactive effect as the report and order herein effectually does. The situation would then be analogous to one where the Commission had established a regulation or practice within its jurisdiction and, having been in effect for some time, the regulation or practice had become a rule of action which entered into the business dealings of this country. In such a situation, while it might be necessary to change this regulation or practice from time to time as varying conditions require, logic dictates that it should never be changed except upon notice to the carriers and to the public affected thereby, and it "would be altogether intolerable if the change could be made retroactive." *Nebraska-Iowa Grain* v. *U. P. R. R. Co.*, 15 I.C.C. Rep. 90, 93-4.

The carriers have for many years so constructed their tariffs as to make their combination rates applicable from or to the ports of entry or exit on or adjacent to the international border which are the nearest points to the border [fol. 151] where the traffic can be interchanged between the United States and Canadian lines. It is hardly necessary to point out that the manner and form of tariff publication has been adopted in reliance of the Commission's many decisions, hereinbefore cited, which hold in effect that such publication complies with the provisions of the Act and results in making the carriers answerable only for those rates. In this report the Commission abruptly departs from that established principle and holds (Sheets 16-17) that such tariff publication and application do not comply with the provisions of the Act.

It is elementary that before the Commission is authorized to award reparation for alleged damages from past transaction it is necessary to find and fix what would have been a reasonable rate, regulation, or practice at the time

of the transactions which are the objects of the claim for reparation. *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 51 I.C.C. 635, 639.

Thus, the question presented by the Commission's award of reparation is: When did the carriers' practice of publishing and maintaining rates to and from the ports of entry or exit cease to conform to or comply with the provisions of the Act as construed by the Commission? It had not, as recently as May 1, 1957, which is the date of the decision of the Commission in *Endicott-Johnson Corp.* v. *Akron, C. & Y. R.R. Co.*, 300 I.C.C. 373. In that case the entire Commission adhered to the principle that the publication of a rate to the international port of exit made the United States carriers answerable only for that rate. The Commission stated:

> "Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be confined to the rate factors for the movements within the United States." (p. 384.)

[fol. 152] It had not done so less than seven months ago, when Division 3 decided *Conrad Fafard, Inc.* v. *Canadian National Rys.*, 302 I.C.C. 113. It was there held that the ports of entry of Detroit and Port Huron, Mich., "have been regarded by this Commission for all practical purposes, as the international boundary. *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 270 I.C.C. 710" (p. 163).

Even if the Commission herein correctly construes the provisions of the Act, defendants respectfully submit that construction is directly contrary to its own settled administrative interpretation, and should, therefore, not be given any retroactive effect. As stated in *Summer & Co.* v. *Erie R. Co.*, 262 I.C.C. 43, the "practical administration of the Interstate Commerce Act does not permit of any other course", and further:

> "* * * Decisions in major proceedings such as those cited determine the broad outlines of regulatory policy.

which of necessity must be followed in minor proceedings such as the one before us here. * * * The rates here in issue, like all other individual rates, are parts of an integral whole. A change in one rate frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination and undue prejudice and preference which are forbidden by sections 2, 3, 216(d), 305(c), and 404(f) of the act. The regulatory process, therefore, must be continuing and consistent. *Youngstown Sheet & Tube Co.* v. *United States, supra; Board of Trade of Kansas City* v. *United States,* 314 U. S. 534; *Northern Pac. Ry. Co.* v. *United States,* 316 U. S. 346; *Virginia Stage Lines* v. *United States,* 48 Fed. Supp. 79. *An abrupt departure from precedent might require the reopening of previous decisions involving the same or similar issues and a reexamination of all that has gone on before.*" (p. 49.)

In *Eastern Livestock Cases of 1926,* 144 I.C.C. 731, 781; *Tri-State Packers' Assn., Inc.* v. *Pennsylvania R. Co.,* 209 [fol. 153] I.C.C. 192, 201; and *American Fruit Growers, Inc.* v. *Southern Pac. Co.,* 222 I.C.C. 513, 517; and cases there cited, in discussing the question of reparation with respect to the assailed rates, the Commission stated that when the history of the rates was such as to justify the carriers in believing that they were maintaining rates which had its approval, the Commission had the power to fix reasonable rates for the future and in that "flexible limit of judgment which belongs to the power of fixing rates" to refuse to hold the rates unreasonable in the past. By holding heretofore that rates published to United States ports of entry or exit on or adjacent to the international boundary fix the extent of the Commission's jurisdiction over international traffic "in so far as the transportation takes place within the United States", the Commission has given its tacit approval to the publication and maintenance of rates similar to those in issue in the instant proceedings. Having acted in reliance on that tacit approval for many years, the carriers should not now be held to have done so at their peril, and to have violated the law and made themselves liable for damages.

Not only are the rates on the outbound products themselves not in issue in these proceedings, but nowhere in the record is there any evidence to indicate that the measure of the assailed rates alone is responsible for the alleged inability of the complainants to compete in Official Territory in the sale of asbestos products. As a matter of fact, as has already been indicated, the products made from spinning fibre generally do not compete with those made from non-spinning fibre. Moreover, some of the complainants have plants in Official Territory as well as in the South.

Certainly on the record in these proceedings and without regard for the change in the Commission's jurisdictional concept hereinbefore discussed at length, reparation may not equitably be awarded.

[fol. 154] II.

THE REPORT OF THE COMMISSION IS IN ERROR AS TO MATTERS OF FACT.

The petitioners are firmly of the belief that the report of the Commission is in error as to matters of law for the reasons hereinbefore given, and if their contentions in that respect are upheld on reconsideration, it will be unnecessary to consider the remaining portion of this petition. Should the Commission refuse to accept the validity of the petitioners' contentions that the report of the Commission is in error as to matters of law, the petitioners respectfully submit that it is also in error as to matters of fact. They respectfully submit that on the record before the Commission it was error to find the assailed rates were and are unjust and unreasonable. It was also error to find the assailed rates are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors.

A. THE RATES WERE NOT AND ARE NOT UNJUST, UNREASONABLE, OR OTHERWISE UNLAWFUL.

The complaint in the titled case alleged in effect that the combination rates applicable on crude asbestos and asbestos

fibre from Black Lake, Coleraine, and Thetford Mines, P.Q., to Charlotte, N. C., were unjust, unreasonable, unduly and unjustly prejudicial compared with those applicable from the same origins to Chicago, Waukegan, Illinois, and Milwaukee, Wisconsin. That complaint has never been amended, and it should be decided with due regard for the allegations there made and the evidence submitted as proof of those allegations.

The remaining complaints, none of which was filed prior to December 6, 1954, alleged that the rates therein assailed were unlawful by comparison with rates in Official and Western territories. Those complaints must likewise be [fol. 155] decided with due regard to those allegations and the evidence offered in support thereof.

The record shows that with rare exception the defendants do not maintain joint class or commodity rates for application on traffic moving between points in Canada and points in Southern territory. That is an extremely important factor to be borne in mind in determining the lawfulness of the assailed rates since the pattern of rates applicable on this particular traffic to Southern destinations conforms to the pattern of rates applicable generally on traffic moving between points in Canada and points in the South.

The record also establishes the fact that rates on these commodities from the several origins to Chicago, Waukegan, Ill., and Milwaukee, Wisc., were established many years ago by Canadian lines to meet water competition, and the present threat of motor truck and/or water competition constitutes a practical deterrent in possible increases in the level of those rates.

The record shows that the preponderance of the shipments of asbestos to Carolina destinations are of spinning grades; that the reverse is true in Official and Western territories; that there are few, if any, shipments of spinning fibres from any of these origins to points west of Akron, O.; and that the products made from the one type of asbestos are not generally competitive with those made from the other. The record also shows that a revision of the joint rates on these commodities to destinations in Official territory was contemplated with a view to restrict-

ing the application of such rates to non-spinning grades of asbestos fibres. Admittedly, that revision has not been accomplished, as the report notes (sheet 15). That revision was agreed to by both the Canadian and the interested United States lines, but for reasons unknown to the United States lines, the Canadian lines, as the rate publishing lines, have refused to make the necessary tariff revision, [fol. 156] despite the repeated efforts of the United States lines to bring about the rate revision referred to.

The record is clear that the level of the joint rates to destinations in Official territory is a level depressed by effective motor truck competition. Admittedly, some of that rate structure was in existence before motor truck competition became a factor, but the record is clear that present-day motor truck competition is so real and effective that any attempt on the part of the petitioners to increase the level of those rates would divert the traffic to the motor carriers. The record is equally clear that motor carrier competition is not a factor affecting the movement of traffic and the rate level between the points here involved.

To enable the Commission to prescribe reasonable rates Congress delegated to it a quasi legislative or administrative power, the exercise of which necessarily involves the use of wide but sound discretion. The Supreme Court has aptly termed that discretion "the flexible limited judgment which belongs to the power to fix rates", but the Commission itself has repeatedly held that its flexible limit of judgment obtains equally whether the rate to be fixed is to apply as to the past, present, or future. The only effect of finding a rate unreasonable or unlawful for the past is to afford a basis for an award of reparation.

In *Anadarko Cotton Co.* v. *A., T. & S. F. Ry. Co.*, 20 I.C.C. 43, the Commission stated that the standard of the law by which the validity of any rate as affected by its amount is determined is not more definite than that it must be just and reasonable. It there noted that the test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rates in effect at any particular time. In that case the Commission also held that it was not "justified in awarding damages in any case except on a

basis as certain in law and in fact as is essential to the [fol. 157] support of a final judgment or decree requiring the payment of a definite sum of money by one party to another."

In considering the awarding of reparation, the Commission has steadfastly insisted upon its right to exercise that same flexible limit of judgment.

This Commission has an obligation in the public interest not to further drain the railroad's depleted treasury by giving windfalls to preferred shippers. The asbestos involved herein moved freely, and there is no evidence that the assailed rates hindered the sale or movement of a single shipment in the territory embraced by these complaints. To award reparation now on shipments which moved as long ago as 1949 would be completely unfair and inequitable, especially in view of the dire need for additional revenue as evidenced by the many recent *Ex Parte* proceedings Nos. 162, 166, 168, 175, 196, 206, and *Ex Parte* No. 212 now before this Commission seeking a further increase. The denial here would be nothing more than administrative justice.

The record in these proceedings proves conclusively that the assailed rates have not been shown to have been unjust and unreasonable for the past, and it can be said without any qualification or fear of contradiction that the record in these proceedings will not, as a matter of law, support an award of reparation.

## Conclusion and Requested Findings

These complaints assail the lawfulness of rates applicable on international traffic moving from Canadian origins to Carolina destinations. The assailed rates reflect combination rates made over United States ports of entry on or adjacent to the international boundary, which also are the points nearest to the international boundary where Canadian and United States railroads may interchange international traffic.

[fol. 158] The importance of the legal principle here involved far transcends any other aspect of the proceedings.

The law is clear that United States lines have a clear alternative in respect to their participation in international

traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates, or they may become parties to *joint* rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. The law is equally clear that the Commission has jurisdiction over international traffic only in so far as it takes place within the United States.

For years prior to now the Commission has held that rates published to or from United States ports of entry or exit on or adjacent to the international boundary line fix the extent of the Commission's jurisdiction over international traffic, in so far as the transportation takes place within the United States, and the petitioners have relied on that holding by the Commission.

The petitioners respectfully submit that the prior holding of the Commission with respect to its jurisdiction reflects a practical and sensible construction of the language of the statute. They respectfully submit that the present holding of the Commission with respect to its jurisdiction reflects a wholly impractical and unrealistic construction of the statute, which consequently is unreasonable and, therefore, unlawful. To hold now that failure to publish rates to the actual international line, in lieu of rates to such ports of entry or exit on or adjacent to the international boundary where international traffic is interchanged between Canadian and United States carriers, constitutes a breach of their statutory duty and renders them liable for damages must be regarded as an unreasonable construction of the statute. Defendants respectfully submit that the Commission's abrupt departure from its [fol. 159] own settled administrative construction of the statute is arbitrary, in that it gives no cogent reasons for now overturning that construction and, in addition, gives retroactive effect thereto by awarding reparation.

WHEREFORE, petitioners respectfully request the Commission upon reconsideration to find that these complaints present issues not within the purview of the Act and are, therefore beyond the jurisdiction of the Commission. Should the Commission refuse to so find, petitioners re-

spectfully ask the Commission to find that the assailed rates have not been shown to have been or to be unjust, unreasonable, unduly preferential or unduly prejudicial. Petitioners respectfully ask that the complaints be dismissed:

Respectfully submitted,

J. Raymond Hoover,
J. Edgar McDonald,
John F. Reilly,
George J. Schwarz,
Attorneys for Defendants.

466 Lexington Avenue
New York 17, N. Y.

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 13th day of June, 1958.

J. Edgar McDonald.

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[fol. 160]

Appendix L to Complaint

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of December, A. D. 1958.

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No. 30846

Thermoid Company, Southern Division

v.

Baltimore & Ohio Railroad Company, Et Al.

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No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

---

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

---

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

---

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

---

[fol. 161] Upon consideration of (1) the record in the above-entitled proceedings, decided May 7, 1958, by the entire Commission; (2) petition of defendants for reopening, further oral argument, and reconsideration, dated June 13, 1958; and (3) complainants' reply thereto, dated July 24, 1958:

*It is ordered*, That the petition be, and it is hereby, denied in all respects, for the reasons that the findings and conclusions in the report of the Commission, decided May 7, 1958, are fully supported by the record, and the

petition does not present substantial grounds to warrant further oral argument and reconsideration.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

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[fol. 162]

APPENDIX M TO COMPLAINT

ORDER

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

[fol. 163] IN THE MATTER OF DEFENDANTS' PETITION TO SHORTEN THE NOTICE UPON WHICH ACTION REQUIRED BY ORDER MAY BE TAKEN.

PRESENT: KENNETH H. TUGGLE, Chairman, to whom the above-entitled matter has been assigned for action thereon.

The Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 25, 1953, and the entire Commission issued its report in the above-entitled proceedings including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958. Upon consideration of the records in these proceedings, and a petition of the defendant railroads for further modification of the order of May 7, 1958, to authorize the defendants to comply therewith upon not less than 10 days' notice, and for good cause shown:

*It is ordered*, That the petition be, and it is hereby, granted, and that the order entered in these proceedings on May 7, 1958, as modified, requiring the defendants to take certain action on or before March 26, 1959, upon not less than 30 days' notice, be, and it is hereby, further modified so as to authorize the action upon not less than 10 days' notice, without change in the effective date.

Dated at Washington, D.C., this 19th day of February, A. D., 1959.

By the Commission, Chairman Tuggle.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 164]

APPENDIX N TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30846*

---

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

---

PETITION FOR LEAVE TO FILE A PETITION ON BEHALF OF THE DEFENDANTS SEEKING REOPENING AND RECONSIDERATION

Come now the defendants in the above-entitled proceedings, sometimes hereinafter referred to as petitioners, and pray leave to file the attached petition seeking the reopening, reconsideration and vacation of the outstanding orders of the Commission therein.

In support of their prayer the petitioners respectfully show:

I.

The complaints in these proceedings allege that the rates applicable on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts and asbestos waste [fol. 165] from specified origins in Quebec, Canada, to specified destinations in North and South Carolina were and are unjust, unreasonable, unduly preferential and prejudicial, as more specifically set forth therein, in violation of Sections 1 and 3 of the Interstate Commerce Act.

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685 and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

In a report decided May 7, 1958, 303 I.C.C. 743, the Commission found the assailed rates to have been and to be unjust and unreasonable, and for the future unduly prejudicial. It also found that the complainants were entitled to an award of reparation and required the defendants to remove the undue preference and prejudice therein found to exist. It further found that the Commission was without jurisdiction to prescribe just and reasonable *joint* through international rates for the future.

II.

By petition dated June 13, 1958, these same petitioners sought the reopening and reconsideration of these proceedings on the ground that the report of the Commission is in error as to matters of law and of fact for the reasons set forth in detail in that petition. Their principal contention was that the assailed rates reflect combination rates made over United States ports of entry on or adjacent to the international boundary line, which for all practical purposes are border points and that consequently for the purpose of administering the Act, insofar as it applies to common carriers and to transportation subject to the provisions of the Act, the jurisdiction of the Commission attaches at the ports of entry into the United States "on or near the international boundary". Those ports of entry are also the points nearest the international boundary where traffic can be interchanged between the Canadian and United States lines.

That petition was denied by order of the Commission dated December 10, 1958.

[fol. 166] III.

In *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, and destined to Denison, Texas. According to the report of the Commission by Division 3, 302 I.C.C. 657, decided January 21, 1958, the complaint in that proceeding assailed the carload rates "from the interna-

tional boundary to Denison" as being unjust and unreasonable. The rates charged on the shipments reflected a triple combination of rates made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, a point within Canada, across the international boundary to Detroit, Mich., a point within the United States, and a rate from Detroit, Mich., to Denison, Tex.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding* (mimeographed), decided October 30, 1958, the Commission made the conventional statement (sheet 6) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable joint through rates." It states (sheet 7) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary*"** were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 [fol. 167] rate "from the *international boundary near Detroit to Denison*"**. The rate applicable from Detroit, Mich., to Denison, Texas, was a class 85 rate of $3.06 (sheet 2). The first class rate applicable from Detroit to Denison was $3.60, and the class 50 rate (50 percent of first class) prescribed was exactly 50 percent of the Detroit-Denison first class rate, namely $1.80.

## IV.

The position of the Commission in the *Yellow Jacket* case, *supra*, is completely at variance and wholly irrecon-

* Commissioner Arpaia was necessarily absent and did not participate in the disposition of this proceeding.

** Emphasis supplied.

cilable with the position taken by the Commission in the instant proceedings.

In the *Yellow Jacket* case the second factor of the applicable combination rate carried the traffic across the international boundary from Windsor, Ont., a point wholly within Canada, to Detroit, Mich., a point wholly within the United States, the international boundary line between Windsor and Detroit being the center of the Detroit River. Nevertheless the Commission disregarded that rate, as well as the Mahone Bay-Windsor rate applicable wholly within Canada, holding that the complainant should properly assail only the rate applicable from Detroit to destination, the latter covering transportation wholly within the United States. The Commission obviously concluded that it had no jurisdiction over either of the other two factors, notwithstanding the fact that the second factor carried the traffic across the international boundary into the United States. That is exactly the position which the petitioners have maintained in these proceedings from the very inception thereof, only to have the Commission thus far fail or refuse to recognize the propriety thereof.

The conflict in the two opposite positions of the Commission is clearly apparent, and cannot be reconciled. If the position of the Commission in the *Yellow Jacket* case [fol. 168] is correct, as the petitioners believe it to be, the position of the Commission in the instant proceedings, where the complaints do not attack that portion of the assailed rates applicable from the international boundary and wholly within the United States, is obviously in error. In any event, it is completely at variance with its subsequent decision in the *Yellow Jacket* case, as well as with a long line of prior cases cited in the petition dated June 13, 1958, including *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203, decided October 11, 1915; *M. Crelinsten & Sons* v. *Railway Exp. Agency*, 201 I.C.C. 284, and *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. In the *Yellow Jacket* case, as well as in each of the other cases referred to, the Commission confined its consideration to the rate factor applicable wholly within the United States. As a matter of fact, in its decision in the *Yellow Jacket* case the Commission cited and properly relied upon the *Albee Fruit* case, *supra*, as authority for the proposition that it lacked juris-

diction to consider the Canadian factor even though that factor carried the traffic across the international boundary. The *Albee Fruit* case is one of the cases also cited and relied upon by the petitioners in support of their position. The action of the Commission in relying upon that case as authority for its position in the *Yellow Jacket* case is clear proof that the denial by the Commission of the petitioners' prior petition was obvious error.

From the very beginning of these proceedings your petitioners have adhered to and relied upon the theory underlying the decision of the Commission in the *Yellow Jacket* case. In the light of that decision they remain steadfast in their belief that the report of the Commission in these proceedings is so in error as to require their reopening for further consideration and disposition consistent with decisions of the Commission covering a period of over fifty years, both prior and subsequent to its decision in these proceedings.

[fol. 169] Petitioners respectfully submit that, unless and until resolved by the Commission, these conflicting decisions can only create considerable confusion and uncertainty, not only among representatives of the shipping public and the railroads, but also among members of the staff of the Commission, as to the proper construction of the statutory limitation on the jurisdiction of the Commission with respect to international traffic.

Wherefore, in accordance with the provisions of Rule 1.101 of the Commission's General Rules of Practice, petitioners respectfully request that they be permitted to file the attached petition seeking the reopening and reconsideration of these proceedings and the vacation of the outstanding orders of the Commission therein.

Respectfully submitted,

J. Raymond Hoover,
J. Edgar McDonald,
John F. Reilly,
George J. Schwarz,
Attorneys for Defendants.

466 Lexington Avenue
New York 17, N. Y.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 20th day of February, 1959.

J. EDGAR MCDONALD

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[fol. 170]

APPENDIX O TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31646*

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THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

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PETITION OF DEFENDANTS FOR REOPENING AND RECONSIDERATION

Come now the defendants in the above-entitled proceedings, sometimes hereinafter referred to as petitioners, and respectfully ask that they be reopened for reconsideration and for the vacation of the outstanding orders of the Commission therein.

In support of their prayer petitioners respectfully show:

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685; and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

## I.

### Resumé of the Proceedings

These proceedings embrace five complaints, the first of which was considered in *Thermoid Company, Southern Division, v. Baltimore & O. R. Co.*, 288 I.C.C. 793, by [fol. 171] Division 3, decided May 25, 1953, but reopened for further hearing. The other four are additional complaints filed after the initial disposition of the first complaint.

The complaint filed on behalf of Thermoid Company, Southern Division v. Baltimore & Ohio Railroad Company et al. (Docket No. 30846), assails the *combination rates* and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Charlotte, N. C. It alleges, that those rates were and are unjust and unreasonable, in violation of Section 1 of the Act, and unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on 136 carload shipments forwarded during the period from June 23, 1949, to February 10, 1952, as well as during the pendency of the proceeding.

Following a hearing in that proceeding Examiner J. Edgar Snider submitted a proposed report which noted that the assailed rates were *combination rates* applicable to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border. That report stated:

> "Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a

clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are [fol. 172] answerable for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

"So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction." (Sheets 1-2)

The proposed report accordingly concluded:

"The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed." (Sheet 2)

The report of the Commission, by Division 3, 288 I.C.C. 793, stated in part as follows:

"Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in *joint international rates* and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned,*

[fol. 173] *the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (p. 794) (Emphasis supplied).

Nevertheless, the Commission concluded that

> "the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered." (p. 796)

By petition dated July 31, 1953, the defendants sought the reopening, oral argument, reconsideration of that proceeding, and their prayer was granted by order of the Commission dated April 5, 1954.

By petition dated May 17, 1954, the complainant sought "the further reopening of this proceeding for the purpose of rehearing and further hearing", and by order of the Commission dated July 30, 1954, the proceeding was reopened for further hearing.

By complaint filed on December 6, 1954, on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683) *combination rates* applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to North Charleston, S. C., are assailed. Those rates are alleged to be unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins specified to North Charleston, S. C., and [fol. 174] to make reparation on shipments forwarded during the statutory period preceding the filing of that complaint, as well as during the pendency thereof.

By complaint filed on December 6, 1954, on behalf of the Thermoid Company, Southern Division (Docket No. 31684) *combination rates* applicable on crude asbestos and asbestos fibre from Danville, St. Malachie, and Warwick, P. Q., to Charlotte, N. C., are assailed. Those rates are alleged to be excessive, unjust and unreasonable, and unjustly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins named to Charlotte, N. C. No reparation is sought by that complaint.

By complaint filed on December 13, 1954, on behalf of the Union Asbestos and Rubber Company (Docket No. 31685) *combination rates* and charges applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Marshville, N. C., are assailed. Those rates allegedly were and are unjust, unreasonable, unduly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from the Canadian origins named to Marshville, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

By complaint filed December 13, 1954, on behalf of the Carolina Asbestos Company (Docket No. 31686) *combination rates* applicable on crude asbestos, asbestos fibre, as-
[fol. 175] bestos refuse, asbestos shorts, and asbestos waste, from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Davidson, N. C., are assailed. Those rates are alleged to be unjust and unreasonable and unduly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish

just and reasonable rates for future application on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste, from the Canadian origins named to Davidson, N. C., and be required to make reparation on shipments forwarded during the statutory period preceding the filing of this complaint, as well as during the pendency thereof.

In the *Report of the Commission*, 303 I.C.C. 743, decided May 7, 1958, the Commission found that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates by the specific amounts set forth therein.

[fol. 176] The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

The Commission further found that the complainants in Dockets Nos. 30846, 31683, 31685, and 31686 were dam-

aged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases therein found to have been just and reasonable.

The report specifically provided for the addition of the applicable general increases authorized on and subsequent to March 12, 1951, to all of the rates resulting from the findings therein.

## II.

### The Report and Orders Are in Error as to Matters of Law

The legal principles involved in these proceedings are of such importance to both the Canadian and the United States lines affected thereby that they have already concluded to seek court review thereof if that becomes necessary. However, they are so completely convinced with the correctness of their position, they believe that upon further consideration the Commission will be persuaded that its report is in error. Accordingly they are submit- [fol. 177] ting this petition in order to afford the Commission an opportunity to correct its own error rather than to compel the carriers to seek relief through court review.

In their prior petition dated June 13, 1958, the defendants argued that the report is in error on the issue of jurisdiction. They there argued at length the history of the Act, principles of statutory construction, the previous construction by the Commission itself, the cases relied upon by the Commission, the Commission's prior concern over this issue, and the complete practicality of the construction contended for by the petitioners. They also argued that the report is in error as to the jurisdiction of the Commission over Canadian lines, that the report and order of the Commission amount to the prescription of through international rates, and that the report is in error in applying a changed concept of Commission jurisdiction retroactively.

In the light of the decision of the Commission in *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, decided

October 30, 1958, they are more than ever convinced that those arguments are sound and properly applicable in this instance. However, in the interest of brevity and in order to minimize the necessity for repetition, your petitioners ask that the petition of June 13, 1958, be deemed a part hereof and that the specific arguments made in this petition be treated as additions to those previously submitted.

A. The Report Is In Direct Conflict With The *Yellow Jacket*; As Well As With Prior Decisions, Involving The Same Jurisdictional Principle.

In dealing with this petition, the fact to be kept constantly in mind is that since issuing its report in these proceedings on May 7, 1958, the Commission has reverted to its prior position with respect to the jurisdictional principle here involved.

[fol. 178] In *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, Docket No. 31990, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, and destined to Denison, Texas. According to the report of the Commission, by Division 3, 302 I.C.C. 657, decided January 21, 1958, the complaint in that proceeding assailed the carload rates "from the international boundary to Denison" as being unjust and unreasonable. The rates charged on the shipments reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, a point within Canada, to Detroit, Mich., a point within the United States, and a rate from Detroit, Mich., to Denison, Tex.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding* (mimeographed), decided October 30, 1958, the Commission made its conventional statement (sheet 6) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and

* Commissioner Arpaia was necessarily absent and did not participate in its disposition.

reasonable *joint* through rates".* It states (sheet 7) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary*"* were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 rate "from the *international boundary near Detroit to Denison*".* The rate applicable from Detroit, Mich., to Denison, Texas, was a class 85 rate of $3.06 (sheet 2). The first class rate [fol. 179] applicable from Detroit to Denison was $3.60, and the class 50 rate (50 percent of first class) prescribed was exactly 50 percent of the Detroit-Denison first class rate, namely $1.80.

In the *Yellow Jacket* case, the second factor of the applicable *combination rate* carried the traffic across the international boundary from Windsor, Ont., a point wholly within Canada, to Detroit, Mich., a point wholly within the United States, the international boundary line between Windsor and Detroit being the center of the Detroit River. Nevertheless the Commission disregarded that rate, as well as the Mahone Bay-Windsor rate applicable wholly within Canada, holding that the complainant should properly assail only the rate applicable from Detroit to destination, the latter covering transportation wholly within the United States. The Commission obviously concluded that it had no jurisdiction over either of the other two factors, notwithstanding the fact that the second factor carried the traffic across the international boundary into the United States. That is exactly the position which the petitioners have maintained in these proceedings from the very inception thereof, only to have the Commission thus far fail or refuse to recognize the propriety thereof.

The position of the Commission in the *Yellow Jacket* case, *supra*, is completely at variance with the position taken by the Commission in the instant proceeding, and

* Emphasis supplied.

the conflict in the two positions cannot be reconciled. If the position of the Commission in the *Yellow Jacket* case is correct, as the petitioners believe it to be, the position of the Commission in the instant proceedings, where the complaints do not attack that portion of the assailed rates applicable from the international boundary and wholly within the United States, is obviously in error. In any event, it is completely at variance with its subsequent decision in the *Yellow Jacket* case, as well as with a long line of prior cases cited in the petition dated June 13, 1958, [fol. 180] including *M. Crelinsten & Sons* v. *Railway Exp. Agency, Inc.*, 201 I.C.C. 284, and *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. In the *Yellow Jacket* case, as well as in each of the other cases referred to, the Commission confined its consideration to the rate factor applicable wholly within the United States. As a matter of fact, in its decision in the *Yellow Jacket* case the Commission cited and properly relied upon the *Albee Fruit* case, *supra*, as authority for the proposition that it lacked jurisdiction to consider the Canadian factor even though that factor carried the traffic across the international boundary. The *Albee Fruit* case is one of the cases also cited and relied upon by the petitioners in support of their position. The action of the Commission in relying upon that case as authority for its position in the *Yellow Jacket* case is clear proof that the denial by the Commission of the petitioners' prior petition was obvious error.

*(a) The United States Lines Do Not Participate in Joint Rates On The Involved Traffic.*

The report of the Commission concedes (p. 732), as it must, that under the Interstate Commerce Act the jurisdiction of the Commission extends to the transportation here involved only to the extent that it takes place within the United States. It again concedes, as it must, that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic, namely, they can publish rates to or from the international boundary, in which event they are answerable *only* for those rates, or they may participate in rates to or from

points in Canada and thus become *jointly and severally* liable for any unlawfulness in such rates.

The defendants have not entered into *joint rates* from the Canadian origins to the southern destinations here involved, and none of the complaints assails the lawfulness of the rates applicable to that portion of the transportation performed wholly within the United States. On the con- [fol. 181] trary, each of the five complaints which the Commission is here called upon to consider assails *combination rates*, made over United States ports of entry on or adjacent to the international boundary, applicable from Quebec origins to destinations in North and South Carolina. In each instance the first factor of the assailed combination rates is made up of *a single line rate* published by the Quebec Central Railway or the Canadian National Railways. Each of those lines alone controls the level of its rate and the United States lines have no voice whatever in the making of those rates or the level on which they are published and maintained. In each instance the second factor is a joint rate published by the United States lines alone. Those lines alone control the level of those rates and the Quebec Central and the Canadian National Railways have no voice whatever in the making of those rates or the level on which they are published and maintained.

The report states that the contentions of the defendants are based upon their assumption that since Newport and East Alburgh are ports of entry into the United States those points are, for all practical purposes, border points and that the rates therefrom to the considered destinations conform to the first alternative mentioned. The Commission, however, states that "the facts indicate otherwise", pointing out that Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and stating that the rates maintained by the Canadian lines to those points obligate those carriers "to provide substantial transportation service within the United States". What substantial transportation service the Canadian lines are obligated to perform within the United States in this instance, which they were not likewise obligated to perform in all of the other cases cited by the petitioners, is not apparent and the report of the Com-

mission makes no attempt to indicate. Actually, as the record proves conclusively, the only service performed by the Canadian lines is the delivery of the traffic to the [fol. 182] United States lines at those points, the points nearest the international boundary where traffic can be interchanged between Canadian and United States lines.

The report concedes that in some instances the Commission has considered ports of entry "such as Rouses Point, 0.5 mile from the boundary", as border points. That might be taken as an implication that whether or not a port of entry is to be treated, for all practical purposes, as a border point depends upon whether it is less than 3 miles from the international boundary line. Merely to ask if such an arbitrary yardstick may lawfully constitute the basis upon which the Commission may administer the statute in its application to international traffic is to disclose its complete lack of merit. Neither have the petitioners been able to find another case where the Commission exercised its jurisdiction because a *combination rate* applicable on international traffic made over a point 3 or 5 miles south of the international boundary.

In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, where the Commission was asked to deal with rates on fruit from Florida origins to Montreal, the Commission noted that the *combination rate* applicable from Rouses Point, N. Y., to Montreal, was published and on file with it, but nevertheless held that *the rate was not subject to the provisions of the Interstate Commerce Act.* How the Commission could regard the character of the rate factors applicable from the Quebec origins to East Alburgh or Newport in this instance any differently from the Rouses Point-Montreal factor in the *Fruit Importers* case is not readily apparent.

*Crelinsten, M. & Sons* v. *Railway Exp. Agency, Inc., supra*, involved the lawfulness of rates on strawberries from Florida origins to Quebec, the United States ports of exit being "Rouses Point, N. Y. or Highgate Springs, Vt., *points a few miles south of the international boundary*".* Actually the [fol. 183] distance from Highgate Springs, Vt., to the inter-

* Emphasis supplied.

national boundary was 3.53 miles. In that case the Commission was content to regard the transportation from Florida to Rouses Point, N. Y., or Highgate Springs, Vt., as that portion of the total transportation taking place within the United States, observing that "*practically* all of the transportation north of Rouses Point and Highgate Springs was in Canada".* Why it is not similarly bound in this instance, where "practically all of the transportation" north of Newport and East Alburgh was in Canada, is not made clear. What "substantial transportation service within the United States" were the Canadian lines which participated in the transportation of the instant traffic obligated to perform that the Canadian lines participating in the transportation of the traffic involved in the *Crelinsten* case were not likewise obligated to provide? The answer to that question obviously must be none whatever.

*(b) Neither The News Syndicate Case Nor the Lewis-Simas-Jones Case Supports The Position Of The Commission.*

In attempting to reconcile its decision in the *Yellow Jacket* case with the decision of the Supreme Court in *Great Northern Ry.* v. *Sullivan*, 294 U. S. 458, the Commission undertook to rely upon *News Syndicate Co.* v. *N.Y.C.R.R.*, 275 U. S. 179, and *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654, both of which these petitioners have heretofore cited and relied upon in support of their own contentions. Neither of those court decisions support the position taken by the Commission in these proceedings.

Admittedly, the Supreme Court sustained the authority of the Commission to consider the reasonableness of *joint* through international rates for the purpose of determining the amount of damages for which the carriers under its jurisdiction are *jointly and severally* liable.

[fol. 184] The Commission undertook to justify its decision in the *Yellow Jacket* case by arguing that in the *Great Northern* case the court only held that a finding that the *domestic* factor of the applicable through combination rate was unreasonable could not be sustained in the absence of a claim and a determination that the through rate was un-

* Emphasis supplied.

reasonable. It argued that in the exercise of its authority to award damages the Commission requires that "the total rate or charge within our jurisdiction" be shown to exceed a reasonable maximum. It took the position that in measuring damages on international traffic the distinction between *joint rates*, on the one hand, and local rates to and from the border, on the other, is crucial. It accordingly held that, where a complaint is not made against a *joint* through rate, the complaint should be directed to the local rate or rates from the international boundary. As the petitioners have repeatedly pointed out, and have once more emphasized herein, the United States railroads have not joined in *joint* through rates for application on the traffic here involved. On the contrary, it moves under *combination rates* applying to and from United States ports of entry on or adjacent to the international boundary. Those points are not only ports of entry for customs purposes, but also the points nearest to the exact international boundary where traffic may be interchanged between the Canadian and United States carriers. Accordingly the jurisdiction of the Commission in these proceedings is limited, as it was in the *Yellow Jacket* case, to a consideration of the "rates from the border points on or near the international boundary".

*(c) The Decision Results In Confusion As To The Proper Interpretation Of The Statutory Limitation Of The Commission's Jurisdiction Over International Traffic.*

Throughout the course of these proceedings the petitioners have recognized and conceded that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the [fol. 185] transportation of property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property in so far as transportation takes place within the United States. The principal issue presented by this litigation, the petitioners continue to insist, is what constitutes transportation "within the United States" within the meaning of the statute.

It is well established by prior decisions of the Commission and the courts, as well as by statements of the Com-

mission in the instant report, that the *United States* railroads may publish reasonable and lawful rates to and from the border, in which event they are answerable *only* for those rates, or they may participate in *joint* international rates and thus become *jointly and severally* liable for any unlawfulness found in such rates.

The Commission concedes (sheet 5), as it must, that the defendants do not maintain *joint* through rates on the involved commodities from Quebec origins to southern destinations, which automatically means that the assailed rates do not fall within the second alternative, and afford no basis for the assumption of jurisdiction by the Commission on that particular ground. The Commission concedes, again as it must, that the assailed rates reflect *combination* rates made over United States ports of entry where the traffic is interchanged between the Canadian and the United States railroads. Nevertheless, the Commission states (sheet 6) that rates so published do not conform to the first alternative mentioned, apparently because Newport and East Alburgh are 5 and 3 miles, respectively, south of the international boundary and the rates maintained by the *Canadian* lines to those points "obligate those carriers to provide substantial transportation within the United States". Inasmuch as the United States railroads have only two alternatives in dealing with the publication and maintenance of rates to apply on international traffic, according to the decisions of the Commission and the courts, [fol. 186] and they have not conferred jurisdiction on the Commission in this instance by exercising the alternative of participating in *joint* rates, the Commission is obviously wrong in holding that the combination rates here assailed, which apply to and from the United States ports of entry, do not conform to the other alternative.

Whether or not the Commission has jurisdiction to deal with the issues sought to be raised by these proceedings, in spite of the fact that the United States railroads do not participate in *joint* international rates, necessarily depends solely on whether or not the fact that the Quebec Central and the Canadian National Railways maintain single line rates to Newport and East Alburgh, respectively, and transport this traffic across the international

boundary to those ports of entry solely for the purpose of interchanging it with the United States railroads constitutes "substantial transportation within the United States". Certainly the report does not undertake to show that the transportation performed by the Canadian lines to those ports of entry and there interchanging this particular traffic with *United States* railroads is any greater than, or for that matter even as great as, that performed by the Canadian lines in interchanging the traffic involved in the *Carey*, *Crelinsten*, *Albee Fruit*, and *Yellow Jacket* cases with the United States lines at those various ports of entry.

As long ago as 1915, the Commission took the position that its jurisdiction "attaches at the ports of entry". *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203. In that proceeding, which involved *joint* international rates, the Commission held it could not prescribe *joint* through rates from points in Canada to destinations in the United States, but that it could control the rates which the American lines charge from the ports of entry in the United States to destinations in the United States whether they are *joint* rates or separately established rates applicable to the [fol. 187] through transportation. In that proceeding the Commission stated that if the defendants did not readjust their rates in conformity with the finding made therein before December 1, 1915, an order would be entered "requiring the defendants subject to our jurisdiction to establish, in lieu of the present rates, joint and local rates *from the ports of entry*".* Petitioners can find no decision of the Commission involving traffic moving under *combination rates* made over United States ports of entry on or adjacent to the international boundary except the instant one, where the Commission did not take the position that it had jurisdiction to consider only the factor applicable to that portion of the transportation wholly within the United States, namely, the factor maintained by the United States lines from or to ports of entry or exit. In each of those cases the Canadian factor applicable to or from the port of entry or exit necessarily included transportation performed by the Canadian lines within the United States to or from the

* Emphasis supplied.

port of entry at which it was interchanged with those lines. And, after completely ignoring or wilfully departing from that well established principle in the instant proceedings, the Commission in the *Yellow Jacket* case reiterates and again applies that very principle, stating that where shipments originating in Canada move on local rates "from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary".

Petitioners respectfully submit that such inconsistency on the part of the Commission can only create confusion among representatives of the shipping public and rail carriers alike, as well as among representatives of the staff of the Commission itself, as to the proper interpretation and application of the statutory limitation on the jurisdiction of the Commission with respect to international traffic. [fol. 188] In the *Yellow Jacket* case, the complaint apparently alleged (302 I.C.C. 657) that the rates from the international boundary were and are unjust and unreasonable, and asked the Commission to prescribe just and reasonable rates for the future and also to award reparation on past shipments. So far as appears, there was no rate applicable "from the international boundary" to Denison, Texas, the destination there involved. There was a factor applicable from Windsor, Ont., across the international boundary to Detroit, Mich., a port of entry into the United States, and a rate from that point to Denison. What the Commission did, as has heretofore been shown, was to treat not the total rate or charge applicable from the exact international boundary line to Denison, Texas, but only the third factor of the applicable combination rate which applied from Detroit, the port of entry, to Denison, Texas. To have dealt with the total transportation taking place within the United States would have required dealing with a part of the second factor, the Windsor-Detroit international rate, together with the Detroit-Denison factor. Although the instant proceedings and the *Yellow Jacket* case involve almost identical situations, the reports of the Commission nevertheless deal with the jurisdictional aspect of each in an entirely different and irreconcilable manner.

In the *Yellow Jacket* case, the publication of a rate from Detroit, the port of entry, to cover transportation wholly within the United States, had the effect of limiting the jurisdiction of the Commission, or at least the practical exercise of that jurisdiction, to the factor applicable wholly within the United States. In the instant cases, similar rate publication has failed to similarly protect the defendants, and particularly the United States railroads, from the exercise of the Commission's jurisdiction, in direct contravention of its own statement with respect to the point at which its jurisdiction attaches.

If the premise of the *Yellow Jacket* case is correct, as the defendants believe it to be, it follows that in every com- [fol. 189] plaint seeking relief for the future in connection with rates applicable on international traffic, there must be an allegation that the *joint* or *combination* rates assailed are unlawful to the extent they apply to the transportation which takes place within the United States. Nor should the situation be substantially different where the issue relates to past shipments on which the complainant seeks an award of reparation. Admittedly, if the United States lines participate in *joint* rates on international traffic, the Commission has jurisdiction to consider the lawfulness of such rates, but *only* for the ascertainment of damages sustained by a complainant in consequence of the carriers' breach of their statutory duty to maintain lawful rates to and from the border. Under the doctrine of the *Yellow Jacket* case a complainant seeking reparation would likewise have to allege that the rates assailed were unlawful to the extent that they applied to transportation wholly within the United States.

Such allegations would require a complainant to sustain its burden of proof by evidence directed solely to the level of rates and to the transportation thereunder wholly within the United States. Otherwise the Commission would be considering and dealing with rates, transportation factors, and standards over which it has no jurisdiction whatever and of which it may not take official notice. A complaint not so limited but which assailed through rates alone and rested on evidence directed solely to the through rates and through transportation, as in the instant proceedings, should be dismissed on the ground that the rates complained

of are not within the purview of the Act and are, therefore, beyond the jurisdiction of the Commission, as Examiner J. Edgar Snider concluded in his proposed report in the initial hearing in the title proceeding.

Such a doctrine would perpetuate the principle first announced in the *Carey* case, adhered to by the Commission for more than 40 years, and only recently reiterated and [fol. 190] reaffirmed in the *Yellow Jacket* case. It would automatically compel the dismissal of the instant complaints if the petitioners are correct in their contention that, as ports of entry on or adjacent to the international boundary, East Alburgh and Newport are, for all practical purposes, border points within the meaning of the statute, just as were all the other ports of entry in the long line of cases referred to. The application of that doctrine would mean that there could be no question as to the jurisdiction of the Commission over such rates and that the lawfulness of rates applicable wholly within the United States would be measured solely by recognized Commission standards.

Under the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases, the jurisdiction of the Commission attaches at United States ports of entry or exit, and complainants assailing rates applicable on international traffic must allege and prove the unlawfulness of the factors applicable to or from those ports of entry for transportation wholly within the United States. In such instances the defendants know that the issues they are called upon to meet relate solely to the lawfulness of the rate factors applicable wholly within the United States to or from those ports of entry and exit.

Under the doctrine of the instant proceedings, where the Commission assumes jurisdiction beyond the ports of entry or exit, complainants assailing international combination rates made over ports of entry or exit must allege and prove the through rates unlawful. And, the United States railroads must defend the lawfulness of the through combination rates, despite the fact that the *United States* railroads have elected not to participate in *joint* rates on such traffic, and despite the further fact that the first factor of the assailed combination rate is published and controlled entirely by the *Canadian* railroads.

Furthermore, relying on the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases, *United States* rail- [fol. 191] roads for years have published rates for application to and from United States ports of entry or exit, where they chose not to be parties to *joint* rates on international traffic, in the belief that they were conforming to their alternative under the law. The conflict between the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases and the instant proceedings leaves those carriers uncertain as to whether they are conforming to the law, as laid down by the Commission and the courts, or may still be held to have breached their statutory duty.

Moreover, not only the carriers but the shipping public, as prospective complainants, is entitled to a clear administrative finding by the Commission which would leave no room for doubt as to the extent of its jurisdiction and when it will be applied or exercised and when it will not. Such a clear administrative finding is also desirable in order that the staff of the Commission may have no doubts as to the legal requirements of rate publication, and the procedural requirements of pleading and proof where international traffic is involved.

Rule 1.28 of the Commission's General Rules of Practice requires that formal complaints "be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the Act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation". While the Commission has always been extremely liberal in construing the pleadings before it, the Interstate Commerce Act requires that the carriers be notified of the complaint they are required to defend and there must be a statement of the thing which is claimed to be wrong sufficiently to put the carriers upon their defense. *U. S. v. Southern Ry. Co.*, 21 I.C.C. 393. The Commission has also held that, while technicalities will not be permitted to defeat the ends of justice, the Commission must be guided by considerations of equity, and cannot sanction the [fol. 192] unwarranted broadening of issues or the fashioning of a case along lines not so explicitly stated at the outset as to enable defendants to come before it with reasonable

certainty of the things to be defended. *Stuarts Draft Milling Co.* v. *S. Ry. Co.*, 31 I.C.C. 623.

That is particularly true where reparation is sought. When the question of damages is raised carriers have a right to be informed with reasonable definiteness of the grounds on which the claim is based. *Weinberg & Gilbert* v. *Atlantic Coast Line R. Co.*, 208 I.C.C. 749, 752. As the Commission said in *South Carolina Produce Assn.* v. *Aberdeen & R. R. Co.*, 205 I.C.C. 581, 586, although it seeks to avoid technicalities in its procedure, it cannot waive those rules of evidence which afford protection to the rights of the parties to fully inquire into matters of fact urged against them, and that is especially true when the Commission is acting in a quasi-judicial capacity in awarding money damages. The Commission has also held that it is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another. *Anadarko Cotton Co.* v. *A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 49.

In these proceedings the Commission for the first time takes the position that United States ports of entry adjacent to but not on the exact international boundary are not "for all practical purposes * * * international-border points", and thereby creates needless confusion as to the extent of the jurisdiction of the Commission with respect to international traffic and when that jurisdiction will or will not be exercised.

In *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365, a proceeding involving northbound international traffic subject to combination rates made over Port Huron, Mich., the Commission referred to Port Huron as "the last station in the United States on the route of movement", and held [fol. 193] that it might determine only the lawfulness of the factor applicable to the transportation within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710. In the latter case, which involved southbound international traffic subject to combination rates made over Detroit and Port Huron, the Commission characterized those ports of entry as "for all practical purposes * * *

international-border points", and declined to consider the complaint on the ground that it assailed rates over which the Commission had no jurisdiction, despite the fact that it involved factors applicable from Canadian origins to Detroit and Port Huron, Mich., which certainly obligated the Canadian carriers to provide "transportation service within the United States" in order to interchange that particular traffic with their American connections at those ports of entry.

Like Detroit and Port Huron, East Alburgh, Vt., on the Canadian National Railways, and Newport, Vt., on the Quebec Central Railway, are "the last station in the United States on the route of movement" on northbound traffic through those ports of exit, and the first "station in the United States on the route of movement" on southbound traffic.

The refusal of the Commission in these proceedings to treat Newport and East Alburgh as international border points "for all practical purposes", as it did Detroit and Port Huron in the *Hoffman-Taff* and *Dow Chemical* cases, creates needless confusion. Adherence to the position taken by the Commission in the *Carey-Crelinsten-Albee Fruit-Yellow Jacket* cases would result, not only in a practical construction of the statute and a practical exercise of the jurisdiction of the Commission thereunder, but also in a uniform construction of the statute and a uniform exercise of the jurisdiction of the Commission thereunder. The desirability of interpreting the statute in that practical manner, and in exercising the jurisdiction of the Commission [fol. 194] accordingly, rather than in the technical, impractical, and wholly unrealistic manner followed in these proceedings, is too obvious to require argument.

B. The Findings And Order Are Arbitrary And Baseless.

The Interstate Commerce Act applies to international commerce *only* to the extent that the transportation takes place within the United States. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654. Whatever power Congress may have to regulate the conduct of the United States railroads doing business abroad by the limiting provisions of the Transportation Act of 1920, it expressed its purpose not to empower the Commission with general authority to regu-

late rail transportation in foreign countries. Having expressed that purpose, it certainly cannot be argued that Congress had by implication granted the Commission any power to regulate the conduct of foreign carriers and rail transportation in foreign countries. *U. S. v. Pennsylvania R. Co.*, 323 U. S. 612, 621. The failure of the Commission in these proceedings to realize an actual and not just a theoretical limitation on the extent of its jurisdiction makes the report and order invalid as a matter of law.

The report of the Commission purports to recognize the fact that under the law the United States rail carriers have a clear alternative with respect to their participation in international traffic. They may either participate in *joint* international rates to or from points in Canada, and thus become *jointly and severally* liable for any unlawfulness in such rates, or they may publish rates to and from the international boundary, in which event they are answerable *only* for the rates applicable wholly within the United States.

The rates involved in these proceedings are not *joint* rates but *combination rates* made over United States ports of entry, the first stations within the United States on the [fol. 195] routes of movement, and also the first points where traffic is or can be interchanged between Canadian and United States railroads. Under the doctrine of the many Commission cases cited, and particularly *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710, those ports of entry "for all practical purposes are international-border points". Despite the fact that the United States railroads do not participate in *joint* international rates for application on this particular traffic, the report and order of the Commission nevertheless undertake to dispose of the issues raised by the complaints as if for all practical purposes the United States railroads were and are parties to *joint* international rates. In that respect the report and order of the Commission are in error as a matter of law.

Each of the complaints in these proceedings alleges, not that the applicable rates were, are, and for the future will be unlawful "insofar as the transportation took or takes place within the United States", but rather that the rates applicable from origins in Quebec to destinations in North and South Carolina were, are, and for the future will be unlawful. Furthermore, the evidence offered by the

complainants has been submitted squarely in support of those allegations. The prayer of each complaint asks the Commission to prescribe lawful rates not for that portion of the transportation which takes place within the United States, but for application on the involved traffic from Quebec origins to Charlotte and the other southern destinations. At no time during the course of these proceedings did the complainants contend or offer any evidence to prove that the rates assailed in the several complaints were, are, or will be unlawful "insofar as the transportation took or takes place within the United States". On the contrary, in keeping with the allegations contained in the complaints, the complainants have steadfastly maintained that the assailed international rates were and are unlawful, and not [fol. 196] just the measure or portion thereof which covers the transportation service performed within the United States. Accordingly, the complaints present issues not within the purview of the Act and, therefore, beyond the Commission's jurisdiction.

In an apparent attempt either to disregard or circumvent that fatal jurisdictional defect, the Commission proceeds to consider the complaints as though they in fact assail only the measure of the through rates which applies to that portion of the transportation which took or takes place within the United States. On that wholly unwarranted departure from the pleadings before it, the Commission then proceeds to consider evidence offered in support of the actual allegations of the complaints filed with the Commission, and on that evidence alone makes the findings which are here challenged. Stated another way, without any complaint assailing as unlawful *only* the measure of the rates applicable wholly within the United States, and without any evidence which would prove the validity of such an allegation if actually made, the Commission nevertheless makes findings which could be justified only in proceedings in which those issues are properly raised and in which competent evidence is introduced justifying and supporting findings based thereon.

As has heretofore been pointed out, the Commission's own rules of practice require that formal complaints "be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the pro-

visions of the Act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation". The Act requires that the carriers be clearly informed of the complaint they are called upon to defend, and while the Commission has always been extremely liberal in construing the pleadings before it, and has declined to permit technicalities to defeat the ends of justice, the Commission has held that it must be guided by considerations of equity, and it cannot [fol. 197] sanction the unwarranted broadening of issues or the fashioning of the case along lines not so explicitly stated at the outset as to enable the defendants to come before it with reasonable certainty of the things to be defended. Neither can it waive those rules of evidence which afford protection to the rights of the parties fully to inquire into matters of fact urged against them, and that is especially true where, as here, the Commission is acting in a quasi-judicial as well as in a legislative capacity.

On the record in these proceedings the findings and the resulting order are arbitrary and baseless, and the use of the limiting clause "insofar as the transportation took or takes place within the United States" has no validating effect thereon.

*(a) The Findings That The Assailed Rates Were, Are, And Will Be Unlawful.*

Admittedly, if the United States railroads participate in *joint* rates on international traffic, the Commission has jurisdiction to consider the lawfulness of such rates, but *only* for the ascertainment of damages sustained by complainants in consequence of the carriers' breach of their statutory duty to maintain lawful rates to and from the border. Although the United States railroads elected not to participate in *joint* rates on this international traffic, it is obvious that the Commission has treated the complaints and the evidence as if the assailed rates were in fact *joint* rates.

By reason of the fact that the Commission has refused to recognize Newport and East Alburgh, the ports of entry here involved, as international border points for all practical purposes, but instead has taken the position that the

rates maintained by the *Canadian* lines to those points obligate those carriers to provide substantial transportation service within the United States, neither the Commis-[fol. 198] sion, the *Canadian* railroad defendants, the *United States* railroad defendants, nor a court of review may determine from the record in these proceedings the measure of the assailed rates, or those to be established and hereafter maintained, "insofar as the transportation took or takes place within the United States". Neither does the record contain any indication of the measure of the compared rates to Ambler, Pa., and destinations taking the same rates, in so far as that transportation "took or takes place within the United States". Since none of the complaints nor the evidence submitted in support thereof is directed to the measure of the rates and charges made for the transportation which "took or takes place within the United States", and since there is no evidence showing the relative measure of the rates assailed as unlawful versus that of the allegedly preferential rates "insofar as the transportation took or takes place within the United States", it follows that the findings of the Commission that the assailed rates were and are unjust and unreasonable, and are and will be unduly prejudicial and unduly preferential, are invalid. Otherwise the Commission would be dealing with a complaint assailing rates over which it had no jurisdiction and considering evidence with respect to rates and transportation, a substantial portion of which covers railroad service within Canada for which none of the defendants are answerable to the Commission.

The report and order of the Commission are invalid because the allegations of the complaint and the evidence submitted to substantiate those allegations are matters not within the purview of the Commission, and therefore beyond its jurisdiction. They are also invalid because the Commission in effect undertook to remedy the jurisdictional defect in the complaints by considering them as assailing the rates applicable on asbestos from Quebec origins to destinations in North and South Carolina only "insofar as the transportation took or takes place within the United States, and then evaluating evidence submitted in support of entirely [fol. 199] different allegations in an effort to relate it, not

to the allegations of the complaint as filed with the Commission, but rather as the Commission would construe the allegations of the complaint and the evidence after the record had been closed. The Commission thereupon undertook to make findings related to the format of the hybrid complaint created by it, basing those findings upon evidence submitted in support of entirely different allegations and issues. Such administrative legerdemain results in findings without a single shred of evidence to support them. Since findings not supported by competent evidence are invalid, these findings must be deemed to be arbitrary and baseless.

The Interstate Commerce Act gives the right to a full hearing, and that right imposes upon the Commission the duty of deciding proceedings in accordance with the facts proved. A finding without evidence is arbitrary and baseless. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88. If that were not so, as the court there pointed out, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

*(b) The Order Does Not Afford An Actual Alternative.*

In *Texas & Pac. Ry. Co.* v. *U. S.*, 289 U. S. 627, the Supreme Court held (p. 650) that where an order is made under Section 3 an alternative must be afforded, and that the situation must be such that the carrier or carriers, if given an option, have an *actual* alternative. The court noted, however, that was not true of an order issued pur-
[fol. 200] suant to Section 15(1) of the Interstate Commerce Act prescribing maximum or minimum, or maximum and minimum rates.

The report of the Commission in these proceedings merely finds the assailed rates "are and will be unduly prejudicial to the complainants and unduly preferential

to the complainants' competitors in Official Territory". It does not and could not make any finding that the assailed rates "for the future will be" unjust and unreasonable. That is so, not only because of the jurisdictional limitation on the Commission's power to prescribe rates, but also because the lawfulness of the rates to Official Territory is not in issue in these proceedings. It follows that the Commission's order dated May 7, 1958, is one issued under Section 3 and not one issued pursuant to the provisions of Section 15(1).

In complying with a Section 3 order the defendants, under the principle laid down by the Supreme Court in the *Texas & Pacific* case, have an actual alternative of either increasing the allegedly preferred basis of rates or lowering the allegedly prejudiced basis. To be valid, the order in this instance must give the defendants the actual option of either increasing the prejudicial rates to Ambler, and the destinations taking the Ambler basis of rates, or lowering the preferential rates to the southern destinations involved, to reflect the differences fixed by the Commission as necessary to remove the prejudice and preference found to exist.

The report of the Commission states (p. 755) that the rates from the Quebec Central origins to destinations in Official Territory "appear to represent reasonable maxima". Inasmuch as the order of the Commission dated May 7, 1958, refers to that report and makes it a part of the order, the defendants actually do not have the option of increasing the allegedly preferential rates, since the existing rates to those destinations "represent reasonable maxima". [fol. 201] Therefore, the practical effect of the order of the Commission is to prescribe rates, contrary to the principle laid down by the Supreme Court in the *Texas & Pacific* case, despite the fact that the order is not one issued under Section 15(1), and despite the further fact that the Commission is here without authority to prescribe a just and reasonable basis of rates for the future. Viewed in that light, the order of the Commission is invalid because the Commission in effect is prescribing rates, something it can only do where orders are issued under the provisions of Section 15(1). That is made clear by the decisions of the Supreme Court in *New York* v. *U. S.*, 331 U. S. 284, and

*Ayrshire Corp. v. United States*, 335 U. S. 573. As both of those decisions indicate, in the Commission proceedings there under review the Commission had made findings that the rates were, and for the future would be, unjust, unreasonable, unduly and unreasonably preferential and prejudicial, and had prescribed a just and reasonable basis of rates for the future under Section 15(1). The court clearly indicated that an order fixing rates is invalid unless it is one issued under Section 15(1) and is supported by findings that the prescribed rates will be just and reasonable.

*(c) The Finding That The Assailed Rates Were And Are Unjust And Unreasonable Is Invalid.*

If it be said that the report and order does give the defendants an actual alternative, the finding (p. 755) that the assailed rates were and are unjust and unreasonable "insofar as the transportation took or takes place within the United States" automatically becomes invalid.

That finding obviously stems from the action of the Commission in treating the assailed *combination* rates as *joint* rates in order that the Commission might assert jurisdiction to consider the lawfulness of those rates. Even under that circumstance the jurisdiction of the Commission [fol. 202] is limited and attaches only for the ascertainment of damages sustained by the complainants in consequence of the defendants' alleged breach of their statutory duty to maintain lawful rates to and from the border.

The finding that the assailed rates were and are unjust and unreasonable rests on a comparison of those rates with the compared Quebec Central rates to Ambler, and the destinations taking the same rates, which the Commission stated (p. 755) "represent reasonable maxima". If it be said that the Section 3 order in fact gives the defendants the alternative of either raising the Ambler rates or lowering the rates to Charlotte, and the other southern destinations, the mere fact that the Ambler rates may lawfully be increased means that the existing Ambler rates are less than maximum reasonable rates. That fact automatically destroys any basis for regarding the compared Ambler rates as maximum reasonable rates. It also means that the lower Ambler rates are not a proper comparative

basis which would justify an award of reparation on shipments to Charlotte and the other southern destinations.

If it is the position of the Commission that the order is a lawful Section 3 order, which in fact affords the defendants an actual alternative, its action in awarding reparation based on a comparison with Ambler rates, which may be increased because they are less than maximum reasonable rates, is arbitrary and baseless.

## Conclusion and Requested Findings

These complaints assail the lawfulness of rates applicable on international traffic moving from Canadian origins to destinations in North and South Carolina. The assailed rates are not *joint* rates but *combination* rates made over United States ports of entry on or adjacent to the international boundary. Those ports of entry are also the first stations on the Quebec Central Railway and the Canadian [fol. 203] National Railways south of the international boundary, and the points nearest to the boundary where the Canadian and United States railroads may interchange international traffic.

For years prior to its report in these proceedings the Commission uniformly held that rates published to or from United States ports of entry or exit on or adjacent to the international boundary line fixed the extent of the Commission's jurisdiction over international traffic, or at least the extent to which that jurisdiction would be exercised. Since 1915, the petitioners have relied on that well established principle in publishing and maintaining rates for application on international traffic.

In these proceedings the Commission refuses to adhere to that principle for the first time. The Commission not only treats the assailed international rates as *joint* rates, which would give it jurisdiction only to ascertain the damage sustained by the complainants as a result of the defendants' alleged breach of their statutory duty to publish and maintain reasonable rates to and from the exact boundary, and to issue a cease and desist order, but undertakes to make findings the effect of which can only be to fix the rates to be charged from origins in Quebec to destinations

in North and South Carolina. It even goes so far as to apply retroactively the changed concept of Commission jurisdiction created in this report.

Having departed from that principle of more than forty years standing, the Commission in its *report on reconsideration* in the *Yellow Jacket* case, decided less than six months after the issuance of the report in these proceedings, reverts to the principle that its jurisdiction attaches at ports of entry or exit, or will be exercised only at those points.

The petitioners respectfully submit that the prior holdings of the Commission with respect to its jurisdiction [fol. 204] and the exercise thereof, reiterated and reaffirmed in the *Yellow Jacket* case, reflects the only practical construction and application of the language of the statute. The petitioners respectfully submit that the holding of the Commission in these proceedings with respect to its jurisdiction or the application thereof reflects a wholly impractical, unrealistic, and arbitrary construction of the statute.

Moreover, wholly apart from the abrupt departure of the Commission from its own administrative holding that its jurisdiction attaches at ports of entry and exit, the findings and order of the Commission are arbitrary and baseless for the reasons hereinbefore set forth.

WHEREFORE, the petitioners respectfully request the Commission to reopen these proceedings, and upon further consideration to find that these complaints present issues not within the purview of the Interstate Commerce Act and are, therefore, beyond the jurisdiction of the Commission. They also respectfully ask that the prior findings be reversed, the order vacated and set aside, and the complaints dismissed for the reasons hereinbefore given.

Respectfully submitted,

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J. EDGAR MCDONALD,
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Attorneys for Defendants.

466 Lexington Avenue
New York 17, N. Y.

[fol. 205] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 20th day of February, 1959.

J. EDGAR MCDONALD.

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[fol. 206]

INTERSTATE COMMERCE COMMISSION

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No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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Decided

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Rates on crude asbestos and asbestos fiber from Danville, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Que., Can., to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and unduly prejudicial, and for the future to be unduly prejudicial. Commission found, without jurisdiction to prescribe just and reasonable joint through rates for the future. Reparation awarded, undue prejudice ordered removed, and prior order in No. 30846, 288 I.C.C. 793, vacated and set aside.

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[1] This report also embraces No. 31683, Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division v. Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division v. Same; No. 31685, Union Asbestos and Rubber Company v. Same; and No. 31686, Carolina Asbestos Company v. Same.

Appearances as in prior report in No. 30846, 288 I.C.C. 793, and:

*E. B. Ussery, Harrell L. Golden*, and *H. V. Fleming* for complainants.

*J. Edgar McDonald, R. C. Gill, Donat L. Turkal, James L. Taplin*, and *J. Raymond Hoover* for defendants.

REPORT PROPOSED BY ARNOLD J. ROTH, HEARING EXAMINER—June 26, 1957

In the prior report in the title proceeding, 288 I.C.C. 793, the Commission, division 2, found that the rates on crude asbestos and asbestos fiber, in carloads, from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte, N. C., had not been shown to have been or to be unjust and unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they [fol. 207] exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding was first reopened for oral argument before the Commission and reconsideration, and upon petition of the complainant was thereafter by order of July 30, 1954, reopened for further hearing.[2]

In the title proceeding, the complainant, a corporation engaged at Charlotte, in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed June 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines to Charlotte were and are unjust, unreasonable, and unduly prejudicial. The Commission is asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*. In No. 31684, the same complainant, by complaint filed

[2] On further hearing in No. 30846.

December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory and in western territory adjacent thereto are unduly preferential of complainant's competitors located in those territories. The Commission is asked to prescribe lawful rates for the future.

[fol. 208] In No. 31683, by complaint filed December 6, 1954, and in Nos. 31685 and 31686, by complaints filed December 13, 1954, the complainant corporations, which likewise engage in the manufacture, sale, and distribution of asbestos textile products, at North Charleston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson, were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory and in western territory adjacent thereto are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is also engaged in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask the Commission to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

Further hearing in the title proceeding and hearing in the other proceedings was had on a consolidated record, and briefs were filed by the parties. The defendants in their briefs rely entirely upon their contentions that the Commission is without jurisdiction to determine the issues raised by the complainants, in that international rates are [fol. 209] involved. Determination of the jurisdictional

question is dependent upon a complete understanding of the factual situation and the character of the rates assailed, and will be made later herein after discussion of the evidence presented.

Asbestos is the name generally applied to a group of naturally fibrous forms of serpentine or amphibole minerals. In some varieties it has the characteristics of silk or cotton, and it can be spun into thread and woven into fabrics, but it is unique in that it will not burn. Because of these qualities, it has specialized uses for which no substitutes are available. There are several varieties of asbestos, and they differ considerably in composition and physical properties. The most important commercially is chrysolite, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important commercial production of asbestos of the chrysolite variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide which lies between Danville and East Broughton and embraces most of the origin points here involved. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke, Quebec, to Valley Junction, Quebec, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, [fol. 210] Quebec, and St. Malachie is on the line of the same carrier extending eastward from Diamond, Quebec. There is no record of movements from St. Joseph, Robertson, Warwick, or St. Malachie.

On the basis of use, asbestos falls into two principal classes, spinning and non-spinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Non-spinning fibers

consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

In the Province of Quebec, asbestos fibers are classified in nine groups, with different grades generally in each group. Crude asbestos is usually picked and prepared by hand, and is the most valuable form of asbestos spinning fiber. It is described as hand-selected cross-vein material essentially in its native or unfiberized form. Miller fibers are graded and classified with a Quebec standard testing machine, under a method adopted by the Quebec producers in 1931. The machine consists of a nest of four aluminum boxes, superimposed one above the other, and numbered from the top down. The bottoms of boxes 1, 2, and 3 consist of brass screens with progressively smaller openings, and box 4 is a receptacle for the fine fibers that fall through the other three boxes. The nest of boxes rests upon a table, and an eccentric is used to provide a horizontal shaking [fol. 211] movement. To make a test, 16 ounces of fiber is put in the top box and the machine is run a specified number of revolutions. At the end of this time, the fiber that remains in each box is weighed, and these weights give the grade of the sample. The longest fibers remain on the first screen, and the shorter fibers, according to their length, remain in boxes 2 or 3, or drop into the lowest box. The more fiber that remains on the top screen and the less fiber in the bottom box, the higher the grade and the greater the value. If, for example, spinning fiber of a specification of 4-7-4-1 is purchased, it means that, in a sample of 16 ounces, 4 ounces will remain in the top box; 7 in the second, 4 in the third, and 1 ounce will go through all the screens into the fourth box. Thus, the figures of the grade represent the proportion, in ounces, of the different lengths of fiber in a sample pound of asbestos. Asbestos fibers of grades testing 0-8-6-2 and higher are generally classified as spinning fibers.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste

[3] Rates are stated herein in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

testing under 0.0.8.8 and over 0.0.5.11, and asbestos refuse and shorts testing 0.0.5.11 or lower. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-making purposes, and Thetford Mines and Danville will hereafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory and points in western territory adjacent thereto the defendants maintain joint through international commodity rates. The [fol. 212] rates from Danville are substantially lower than those from Thetford Mines, although the comparative distances do not vary greatly. To southern destination, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of the joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore, to the destinations here involved, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the Canadian

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

Pacific. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Dan-
[fol. 213] ville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 miles from the international boundary, at which the shipments are interchanged by the Canadian National with the Delaware and Hudson Railroad Corporation. Until about November 1955 shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, on crude asbestos are 33 cents minimum 40,000 pounds; on asbestos fiber they are 28 cents minimum 40,000 pounds and 25 cents minimum 80,000 pounds; and on asbestos refuse and shorts they are 14 cents minimum 60,000 pounds and 13 cents minimum 80,000 pounds. On asbestos waste from Thetford Mines to Newport the proportional rates are 20 cents minimum 60,000 pounds and 18 cents minimum 80,000 pounds. On asbestos waste from Danville to Baltimore the joint through international rates are 53 cents minimum 60,000 pounds and 48 cents minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35,[5] minimum 50,000 pounds, asbestos fiber is rated class 35, min-
[fol. 214] imum 30,000 pounds, asbestos shorts and waste testing under 0-0-8-8 are rated class 27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are

[5] Class numbers represent percentages of the Docket No. 28300 first class rates.

$1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustments of class rate scales under the Commission's order in Docket No. 28300, this Newport-Charlotte commodity rate ultimately governed the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian [fol. 215] mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of one-tenth to one-fourth cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint

through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke, Que., on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents and later 10 cents over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established on an 80,000 pound minimum to a limited number of points, similar rates were published to all destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of [fol. 216] such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds. The table in the appendix hereto compares representative applicable through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston.

It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. Asbestos producers in Quebec on the Quebec Central, on shipments to points in official territory, absorb these rate differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. No such absorption is practiced on shipments to southern points. The complainants raise no issue concerning these rate differences as such, but ask only that if relief is afforded them similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distances. For example, the rates on asbestos fiber from Danville to Ogdenburg, N. Y., short-line distance 209 miles, and to Winchester, Va., 700 miles, are the same as the rates shown to Ambler and

Manville, 68 cents minimum 40,000 pounds and 61 cents minimum 80,000 pounds, and the same rates apply to [fol. 217] practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1026 miles, and to Hannibal, Mo., 1149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08 minimum 60,000 pounds and $1.07 minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14 minimum 60,000 pounds and $1.12 minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago and 67 cents and 61 cents to St. Louis.

[fol. 218] Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the Docket No. 15879 class rates prescribed for application initially within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official territory points with the class rates and with combinations rates constructed as are the rates to the complainants' destinations. For example, on crude

asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

There is production of asbestos at Matheson, Ont., and Vancouver, B. C. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the Carolina destinations here involved, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana [fol. 219] points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38, this rate was likewise made applicable to group A points, the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson Calif., for distances approximately 2.5 times the distances to the Carolina destinations, on asbestos fiber are $1.72 and $1.89 minimum 60,000 pounds and $1.28 and $1.45 minimum 80,000 pounds; on asbestos waste they are $1.13 and $1.27 minimum 80,000 pounds; and on asbestos refuse and shorts they are $1.13 and $1.22 minimum 80,000 pounds.

The complainants have lost ground in their efforts to compete in recent years in the sales of asbestos textile products, particularly since the general readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000

pounds. The proportion of industry-wide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first three months of 1955; in 1949 this complainant marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 it had dropped 80.2 percent. Raybestos-Manhattan, Inc., had its [fol. 220] proportion of total industry production drop from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952 the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production, by 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has maintained generally its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles have been confined to North and South Carolina by the force of competition from official territory producers, and even there the competition is keen.

In April 1949 the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte but the proposal was disapproved. The defendants show that traditionally rates from Canadian origins to points in the [fol. 221] south are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in the instant proceedings only over the rates factors applicable south-

bound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the south, with which they compare favorably. They contend also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian lines over extension of their lines from border points in Michigan can effect delivery without participation of United States carriers. They admit, however, that to points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, and particularly upon the establishment of the 80,000 pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers testing 0-8-6-2 or higher at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 per ton, and assert that [fol. 222] in their view the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories,* 299 I.C.C. 375, and were there found not shown to be just and reasonable and were ordered cancelled. The defendants also show, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of shipments to the Carolina destinations are of spinning grades, that the reverse is true in official and western territory, and that there are few if any shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the latter circumstances, it was indicated

at the hearing that revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on the spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor carrier competition, but the record is clear that the present rate structure was evolved long before motor competition was a factor.

The complainants argue on brief that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the [fol. 223] prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained in official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, that such rates are not subject to the jurisdiction of this Commission, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to the jurisdiction of the Commission, in view of the fact that these points are ports of entry, that the complainants do not assail only the lawfulness of the rates applicable to that portion of the transportation wholly within the United States, but instead assail the combination rates, and that the complaints therefore present no justifiable issue within the jurisdiction of the Commission and should be dismissed.

Under the Interstate Commerce Act, the jurisdiction of the Commission applies to the transportation here involved only to the extent that it takes place within the United States. It is well settled that the railroads operating within the United States have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate*

*Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15. The Commis- [fol. 224] sion has no jurisdiction to prescribe joint through international rates for application partially within Canada, as sought by the complainants.

The contentions of the defendants proceed from the assumption that the points of Newport and East Alburgh are for all practical purposes border points, and that the rates here in issue conform to the first alternative indicated above. The facts, however, indicate otherwise. East Alburgh is some 3 miles from the border, and Newport is 5 miles beyond it. The proportional rates maintained by the Canadian lines are applicable only on traffic destined to points in the United States, and they obligate these carriers to provide transportation service within the borders of the United States. Jurisdiction is not a concept governed by practical considerations, but is absolute. To the extent, therefore, that transportation within the United States under the proportional rates is performed by the Canadian lines, they are subject to the jurisdiction of the Commission. To hold otherwise would result in the establishment of a jurisdictional no-mans-land, the extent of which would vary from 0.5 miles at Rouses Point to 3 miles at East Alburgh and 5 miles at Newport.

The defendants err, therefore, when they contend that their rates southbound from Newport and East Alburgh are in fact rates applicable from the border. The Commission has jurisdiction to determination the lawfulness of combination rates based upon a point within the United States, to the extent that the total transportation takes place within the United States. See *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365. As the rail lines within the United States may meet their statutory obligations by the establishment [fol. 225] of rates to and from the border, so may the Canadian lines avoid the jurisdiction of the Commission by the establishment of rates applicable only within Canada to the border, which need not be filed with the Commission. Practical considerations of operating necessity in effecting interchange may then come into play as to whether such interchange will be effected on one side of the border or the other. The complainants are entitled to just, reason-

able, and otherwise lawful rates applicable to transportation within the United States, and they are likewise entitled to assail the lawfulness of the actual rates available to them for all of such transportation, rather than, as contended by the defendants, only the factors applicable from East Alburgh and Newport.

The record is clear that the complainants' competitors at Ambler, Manville, Chicago, St. Louis, and other points in official territory are being unduly preferred, to the undue prejudice and disadvantage of the complainants. It is likewise clear that the assailed combination rates are unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to points in the United States. The rates from the Quebec Central mines to St. Louis and Chicago for distances comparable to those from the Canadian origins to the Carolina destinations are generally on the highest levels and appear to represent reasonable maxima. Equitable treatment of the complainants would dictate, however, that they are entitled to rate levels from the Canadian National mines relatively the same as those available to receivers in official territory, in order to remove the preference and prejudice [fol. 226] found to exist. While as indicated above, the Commission has no jurisdiction to prescribe for the future joint through international rates applicable in part within Canada, it may order the removal of undue preference and prejudice to the extent that the transportation takes place within the United States.

The Commission should find that the assailed rates, insofar as the transportation took place within the United States, were and are unjust and unreasonable to the extent that they exceeded and exceed, from Danville, Warwick, Black Lake, Coleraine, Thetford Mines, and East Broughton, $1.32 minimum 50,000 pounds on crude asbestos to Charlotte, Davidson, Marshville, and North Charleston; $1.01 minimum 40,000 pounds and 93 cents minimum 80,000 pounds on asbestos fiber to Charlotte, Davidson, and Marshville, and $1.14 minimum 40,000 pounds and $1.04 minimum 80,000 pounds on asbestos fiber to North Charleston; and to Davidson 62 cents minimum 60,000 pounds and 57 cents minimum 80,000 pounds on asbestos refuse and shorts, and

70 cents minimum 60,000 pounds and 64 cents minimum 80,000 pounds on asbestos waste; all subject to the applicable increases authorized on and after March 12, 1951.

The Commission should further find that the assailed rates from Danville, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton are, and for the future will be, unduly prejudicial to the complainants, insofar as the transportation takes place within the United States, to the extent that the rates from these [fol. 227] origins to Charlotte, Davidson, and Marshville exceed or may exceed the joint rates that are or hereafter may concurrently be maintained on like traffic to Chicago, and to the extent that the rates from these origins to North Charleston exceed or may exceed the joint rates that are or hereafter may be maintained to St. Louis.

The Commission should further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, and were damaged and are entitled to reparation, with interest, in the amount of the difference between the charges collected and those on the bases herein found to have been reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In those instances in which shipments from Danville and Warwick were interchanged by the Canadian National and St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

An appropriate order for the future should be entered, requiring removal of the undue prejudice found to exist, and vacating the prior order entered in No. 30846.

| | Crude asbestos | | | | Asbestos fiber | | | |
|---|---|---|---|---|---|---|---|---|
| | From Danville, Que. | | From Thetford Mines, Que. | | From Danville, Que. | | From Thetford Mines, Que. | |
| | Short line Distance | Rates[1] minimum 40,000 lbs. | Short line Distance | Rates[1] minimum 40,000 lbs. | Rates[1] minimum 40,000 lbs. | Rates[1] minimum 80,000 lbs. | Rates[1] minimum 40,000 lbs. | Rates[1] minimum 80,000 lbs. |
| | *Miles* | *Cents* | *Miles* | *Cents* | *Cents* | *Cents* | *Cents* | *Cents* |
| Manville, N. J. | 480 | 68 | 521 | 97 | 68 | 61 | 86 | 79 |
| Ambler, Pa. | 529 | 68 | 570 | 97 | 68 | 61 | 86 | 79 |
| Chicago, Ill. | 907 | 103 | 987 | 132 | 85 | 77 | 101 | 93 |
| Kirkwood (St. Louis), Mo. | 1118 | | 1198 | | 97 | 87 | 114 | 104 |
| Charlotte, N. C. | 1042 | 150 | 1083 | 154 | 134 | 131 | 134 | 131 |
| Davidson, N. C. | 1031 | 149 | 1072 | 152 | 134 | 131 | 134 | 131 |
| Marshville, N. C. | 1068 | 152 | 1109 | 156 | 136 | 133 | 136 | 133 |
| North Charleston, S. C. | 1175 | 159 | 1216 | 163 | 154 | 151 | 158 | 155 |

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 30,000 pounds beyond.

[fol. 229]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 30846*

THERMOID COMPANY-SOUTHERN DIVISION,

v.

THE BALTIMORE AND OHIO RAILROAD CO., ET AL.

REPLY OF COMPLAINANTS—Filed July 25, 1958

(To Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.)

Come now the complainants in the above entitled proceedings and file this their reply to the Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.

[fol. 230]

PRELIMINARY STATEMENT

We have reviewed and studied Petition of Defendants for Reopening and Reconsideration, dated June 13, 1958, and find that it is a restatement, for the most part, of the contentions of defendants previously advanced, to wit: in the Brief of Defendants on Further Hearing filed by Mr. McDonald under date of May 14, 1956; the Brief on behalf of Canadian National Railroad Company filed by Mr. Hoover under date of April 30, 1956; in the Defendants' Exceptions to report proposed by Arnold J. Roth, Hearing Examiner, filed by Mr. McDonald under date of August 19, 1957; in Exceptions of Canadian National Railroad Company to examiner's proposed report, filed by Mr. Hoover under date of August 19, 1957; and in the Oral

* Also embraces No. 31683, Raybestos-Manhattan, Inc., General Asbestos and Rubber Division v. Baltimore & Ohio R. R. Co.; No. 31684, Thermoid Company-Southern Division v. Same; No. 31685, Union Asbestos & Rubber Co. v. Same; No. 31686, Carolina Asbestos Co. v. Same.

Argument made by Mr. McDonald before the entire Commission on December 10, 1957.

This recapitulation of previous arguments is particularly true in regard to the question of whether or not the Commission has jurisdiction to grant relief in these proceedings. The cases cited by the defendants in the petition, in connection with the jurisdictional issue, are the identical cases heretofore cited by them as set forth above. Nothing new is injected by the defendants in connection with the jurisdictional question. In fact, there is an admission on the part of the defendants that the Commission does have jurisdiction but the plea seems to be that the Commission should refrain from exercising jurisdiction in the instant [fol. 231] case because the language used in some previous decisions seemed to imply that the defendants were under a duty to establish either *joint* through rates or local rates from so-called border points near the international boundary line.

Complainants in their Brief filed May 14, 1956, dealt exhaustively with the "Jurisdiction of the Commission and the Duties and Requirements of the Act as to International Shipments Participated in by United States Carriers." Treatment of the subject will be found in that Brief from Page 12 through Page 48. Complainants also dealt with the subject matter in their Reply to the Defendants' Exceptions to the examiner's proposed report.

Although the entire Commission had the instant case under consideration from December 10, 1957, to May 7, 1958, defendants persist in raising their old arguments, thus we feel constrained to comment briefly thereon.

Before entering upon a further discussion of the jurisdiction question, we desire to discuss the "Resume of the Proceedings" advanced by the petitioners in the pleading of June 13, 1958. The complaints speak for themselves. Nevertheless, we call attention to the statement made on Page 2 of the petition which dealt with the original complaint of Thermoid Company—Docket No. 30846—filed June 22, 1951. On Page 2 it is stated:

> It alleges in effect that the assailed rates to Charlotte are unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and

prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act.

[fol. 232] Reference to Page 7 of the Thermoid complaint filed on June 21, 1951, will reveal that it was alleged as follows:

> It is respectfully submitted that the above action by the Canadian and New England rail carriers through their rate associations, affords manufacturers located at Chicago, Ill., and other points in Official Territory, unduly and unjustly preferential treatment, and is prejudicial to complainant, located at Charlotte, N. C., in violation of Section 3 (1) of the Interstate Commerce Act.

The attention of the Commission is called to the phrase "and other points in Official Territory".

It is respectively submitted that if it was the intention of the petitioners to imply or argue that the Commission had gone beyond allegations contained in the complaints in relating the Charlotte adjustment to Ambler, Pennsylvania, then certainly such would be entirely without merit.

## The Report of the Commission Is Not in Error as to Matters of Law

The petitioners prefaced their discussion of "The report of the Commission is in error as to matters of law" with a statement that " . . . they have no alternative but to seek reconsideration of the Report of the Commission in the hope that they may thereby avoid any necessity for court litigation with respect thereto." This is a renewal of the threat made by Mr. McDonald, on behalf of the defendants, at the Charlotte hearing. At Page 455 of the record the following appears as a statement made by Mr. McDonald:

> From our standpoint, this is a tremendously important case, and it has been apparent from the beginning that [fol. 233] if the wrong conclusion is reached from the Commission's standpoint, whether we like it or not, we are apparently going to wind up before the Supreme Court of the United States.

Should the instant case become involved in court litigation we are confident of the result. The decision of the Commission in this case, and orders entered therein, will be sustained. We have shown conclusively in our Brief of May 14, 1956, and our Reply to Defendants' Exceptions, dated September 30, 1957, to the Proposed Report of the Hearing Examiner, that the Supreme Court of the United States has already spelled out, with particularity, the duties and obligations of the defendant carriers who perform a transportation service in the United States in connection with international shipments moving on a through bill of lading under applicable through rates.

> *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, 275 U. S. 179, 48 S. Ct. 39; *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592; and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472

Complainants are of the firm conviction that had the Commission declined to take jurisdiction in this case, then, at request, the courts of the United States would have required the Commission to do so.

We are confident that this Commission will not be intimidated by the threats of the petitioners. It is well able to fend for itself in the courts of the United States, even without the assistance of the Attorney General of the United States and of your complainants, who would certainly become intervenors in the event of court litigation.

The petition of defendants is totally devoid of legal rationale, and obviously so, because the defendants are unable [fol. 234] to construct a legal theory to support their contentions.

On Page 11 it is stated:

> The petitioners concede that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the transportation of persons and property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property, insofar as such transportation takes place within the United States. The basic

issue to be decided is what constitutes transportation within the United States in a factual situation such as here exists.

At the bottom of the same page it is stated that the petitioners continue to contend that the publication of rates on the involved commodities from East Alburgh and Newport, Vt., the ports of entry through which this particular traffic moves, fulfills the duty imposed under the various provisions of the Interstate Commerce Act. It is their contention, of course, that the publication of local rates from these interior points makes them immune from Commission jurisdiction. As was brought out at the Oral Argument, the defendants admitted that no asbestos traffic originates at East Alburgh and Newport, Vt. The record shows that the bases for the assessed rates from these interior points in many instances are class rates, and in those instances where commodity rates are applicable from East Alburgh and Newport, the bases thereof are the old class rates. It is obvious from the record that the defendant carriers have made no attempt whatsoever to comply with the provisions of the statute even though the duties imposed on them have been clearly spelled out by the Supreme Court in the cases cited above.

[fol. 235] In our previous pleading we have pointed out that it is the statutory duty of the defendants to make and publish applicable rates from the international boundary to United States points, and that such rates from the international boundary must reflect a charge for the transportation service rendered in the United States and that such a charge cannot reflect two terminal charges. Our position in this matter is based squarely on the decisions of the Supreme Court above cited.

Defendants have a statutory duty to make and publish applicable rates from the international boundary to interior United States points. This they have not done, and we therefore must look to their substitute for this, which is the *entire through rate* found to be unreasonable by the Commission. There can be no question that the proximate cause of the complainants' injury and damage, as found by the Commission, was and is violation of the statutory

duty of these defendants. In *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, supra, we have an astoundingly similar factual and legal situation to our instant case. There, as here, defendants published no applicable legal rate from the international boundary to interior United States points. There, as here, complainants were forced to assail the entire through rate. In both instances the defendant carriers voluntarily elected not to publish a rate from the international boundary which would reflect a transportation charge for that part of the transportation service rendered in the United States in connection with a through international shipment moving on a through bill of lading. Instead, in the *News Syndicate Case* they voluntarily elected [fol. 236] to participate in a joint through rate and, in the instant case, they elected to participate in a through rate based on a combination on an interior point in the United States. These voluntary elections were made, of course, at their own peril. Failure to establish lawful rates from the international boundary was a breach of statutory duty. This breach was the proximate cause of complainants in these proceedings having to pay through charges constructed over an interior United States point.

In upholding a position identical to complainants' in the instant case, the Supreme Court of the United States,[10] through Mr. Justice Butler, stated:

> The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City, Section 1 (1) and (2).[1] It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. Co. v. Sloss-Sheffield

[10] *News Syndicate Co.* v. *N. Y. Central R. Co., supra,* pp. 186-188.

Co., 269 U. S. 217, 231, 46 S. Ct. 73, Ed. 242. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through [fol. 237] charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an "award of damages under the provisions of this act for a violation thereof." Section 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

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The defendants in error participated in the making of the *through rate* and actually collected the excessive charges. By their failure to comply with the act, plaintiff in error was compelled to pay charges based on the *through rates*. On the facts stated, the Commission was authorized to hear the complaint, section 13 (1); and had jurisdiction to make the order, section 16 (1). (Emphasis supplied)

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[1] United States Code, title 49, chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

In *Great Northern Ry. Co.* v. *Sullivan,* 294 US 458, at page 460, the Supreme Court stated that combination rates reflect agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other. This pronouncement on the part of the court was in line with its stand in *St. Louis S. W. Ry. Co.* v. *United States,* 245 US 136, 139, note 2, 38 S. Ct. 49, 50, note 4, 62 L. Ed. 199, 205, note 4. It is also in line with the pronouncement in *Thompson* v. *United States,* 343 US 549, 72 S. Ct. 978, decided June 2, 1952, where the Supreme Court stated:

[fol. 238] The statutory term "through route," used throughout the Interstate Commerce Act,[10] has been defined by this Court as follows:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate'. This 'through rate' is not necessarily a 'joint rate'. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. *Through Routes and Through Rates*, 12 ICC 163, 166." [11]

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[10] 49 U.S.C. par. 1(4), 6(1), 15(3, 4, 8), 49 U.S.C.A. par. 1(4), 6(1), 15(3, 4, 8); 49 U.S.C. (Supp. IV) par. 5b(4), 49 U.S.C.A. par. 5b(4).

[11] St. Louis Southwestern R. Co. v. United States, 1917, 245 U.S. 136, 139, note 2, 38 S.Ct. 49, 50, 62 L. Ed. 199. See also Great Northern R. Co. v. United States, D.C. Del. 1948, 81 F. Supp. 921, 924, affirmed, 1949, 336 U.S. 933, 69 S.Ct. 750, 93 L. Ed. 1093.

Thus it will be seen that there is no legal distinction between a *joint through rate* and a *through rate*.

To continue, it must be further remembered that reparation is prayed for in these complaints and has been awarded by the Commission. Clearly, for the granting of such reparation, it is necessary for the Commission to find the through rates as a whole, from the Canadian origins to the southern destinations to be unjust and unreasonable. Taking the law as laid down in the *News Syndicate Co.* v. *N. Y. Cent. R. Co. Case, supra*, one step further, we find that where two proportional rates are involved the jurisdiction of this Commission and the law as stated in the [fol. 239] above case still applies. This is particularly significant since this is a case where defendant carriers had actually established a rate as called for by the law and

still the Supreme Court finds that they must look at the reasonableness of the entire through rate as a whole.

In *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472, the Court, again speaking through Mr. Justice Butler, stated that, "The shipper's only interest is that the charge shall be reasonable as a whole." The decision concisely answers the questions raised in the instant case and reaffirms the cases previously cited by complainants, as follows:

> If defendant's proportional added to that established by the Canadian Pacific had produced an unjust rate, then to the extent that the total charge was excessive, plaintiff would have been subjected to a disadvantage in competing with others selling fuel in the same territory. The Commission has power to determine rates to be unreasonable in violation of section 1 (49 USCA, Sec. 1) without determining whether their application has resulted or will result in pecuniary loss or damage to the shipper. It may determine whether a proportional constituting a part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. Atchison, T. & S. F. Ry. v. United States, 279 U. S. 768, 776, 49 S. Ct. 494, 7 L. Ed. 947. But the Commisson may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable. News Syndicate Co. v. N. Y. C. R. R., supra, page 187 of 275 U. S., 48 S. Ct. 39. And defendant, enforcing an unlawful charge to be divided between it and the Canadian Pacific, would be liable as a joint tort-feasor for the full amount of the excess. Louisville & N. R. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217, 231, 46 S. Ct. 73, 70 L. Ed. 242, et seq. News Syndicate Co. v. N. Y. C. R. R., supra. Lewis, etc., Co. v. Southern Pac. Co., supra.
>
> [fol. 240] But the claim before us has no such foundation. Plaintiff seeks to recover the difference between the proportional established by defendant and that found by the Commission to be just and reasonable notwithstanding its fuel was hauled from mines to

> the competitive field for a just and reasonable charge. That position cannot be maintained for as to the shipments here involved the Great Northern proportional cannot be applied save as it is a part of the through rate. There was a single charge which, though based on the combination rate, was precisely the same in amount as if the rate had been jointly made. As shown by our decision in Louisville & N. R. R. Co. v. Sloss-Sheffield Co., supra, page 234, of 269 U. S., 46 S. Ct. 73, the division among connecting carriers of charges based on joint rates—those involved in that case were constructed out of existing proportionals—is no concern of the shipper. The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. Morrell & Co. v. N. Y. C. R. R. Co., 104 I. C. C. 104, 128. The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff. Louisville & N. R. R. Co. v. Sloss-Sheffield Co., supra, page 234 of 269 U. S., 46 S. Ct. 73. Parsons v. Chicago & Northwestern Ry., 167 U. S. 447, 460, 17 S. Ct. 887, 42 L. Ed. 231.

In *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592, the Court clearly indicated that in order to comply with the statutory duty imposed by the Act in connection with rates from the international boundary to interior United States points, only one terminal service must be reflected in such rates. In that case, where such a rate reflected two terminal services, the Court unequivocally declared that the carrier violated the Act by failing [fol. 241] to maintain a proper rate covering transportation from the international boundary to interior United States points which reflected only *one terminal service.* The Court further stated as follows:

> The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the

foreign carrier and that of the defendant touch the boundary or, in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that, if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the act. It follows that the lower court erred in distinguishing this case from the News Syndicate Co. v. N. Y. C. R. R., supra. That case controls this one.

Even though we were to assume that Newport and East Alburgh, Vermont, were on the international boundary line, still the factors provided by the defendants from those points to the southern destinations do not square with the duty imposed on them by the Interstate Commerce Act, in that, as noted above in the *Lewis-Simas-Jones* Case, the [fol. 242] Supreme Court has said that in order to comply with the Act, the rate from the international boundary must not reflect two terminal charges.

It cannot be denied that the rates from Newport and East Alburgh, Vermont, reflect two terminals for, as shown by the record, the commodity rates applicable on asbestos fibre to Charlotte, Marshfield, and Davidson, are nothing more or less than the old Docket 21665 class rates. On crude asbestos to all four destination, the applicable

rates from the said points in Vermont are the Docket 28300 local class rates. In the case of North Charleston, the applicable rates on the asbestos fibre from the said Vermont points are also the applicable Docket 28300 rates. Full explanation of the basis for all of these rates from the Vermont points to the southern destinations is outlined by Mr. Gillin his testimony given at the Washington, D. C., hearing. This testimony begins with the last paragraph, Page 576 of the transcript of record.

Under the law it is complainants' right to assail the through transportation charge from the Canadian origins to the Carolina destinations participated in and assessed by carriers subject to this Commission's jurisdiction. Reparation is involved. It is clear from the authorities cited that if complainants had restricted their complaint to the factor south of Newport and East Alburgh, Vermont, this Commission could not grant complainants reparation in connection with Section 1.

It is also clear that the Commission need make no finding whatsoever which deals solely with the factor south of the [fol. 243] international boundary. This is true even though that factor was published strictly in conformity with the requirements which the Supreme Court stated must be observed if the carriers are to comply with the duty imposed on them by the Act under Section 1 thereof in establishing rates for the shippers use from the international boundary to the ultimate destination in the United States. *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, (*supra*); *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592.

Defendants seem to be of the opinion that since it is established law that this Commission cannot prescribe a through rate from the Canadian origin to southern destinations, it is totally helpless to order removed any unlawfulness in the rate structure which it might find. This position is unsound since the Commission has authority to issue cease-and-desist orders both under Sections 1 and 3 of the Act. *Consolidated Mining & Smelting Co. of Canada* v. *N. Y. Central R. Co.*, 299 I. C. C. 231.

We are unable to conceive of a clearer portrayal of existing law in this area.

Were the Commission to adopt the contentions of the defendants, it would result in the absurdity of the Commission's giving the defendants the right to determine Commission jurisdiction. Under their contention, should the defendants desire that the Commission have jurisdiction, they would simply publish joint through rates and file the same in a tariff with this Commission. Should they desire [fol. 244] to withhold jurisdiction from the Commission, they would simply enter into some other kind of arrangement reflecting some type of combination rates made either through use of proportionals—or proportionals and local rates. As we have seen, a *through rate* is a *through rate* regardless of whether it is a joint *through rate* or one reflecting combinations. It is the total charge which the complainants are forced to pay which must be assailed. This is in accordance with the doctrine of the *Sullivan case.*

Principles of statutory construction and previous construction by this Commission really have no place in this case. The duties imposed on the defendants are not ambiguous but, rather, are clearly expressed in both the Act and prior decisions of the Supreme Court, as cited. Insofar as we are concerned it is immaterial if, in some cases in the past, the Commission has seen fit *not* to exercise its jurisdiction, but surely, defendants cannot contend that this constitutes a waiver by the Commission of its jurisdiction in subsequent cases where the issues have been clearly drawn, briefed and argued.

We would respectfully submit that this argument of the defendants when brought to its logical conclusion strikes at the very foundation of the existence and authority of this Commission.

As the Hearing Examiner stated in his Proposed Report:

> Jurisdiction is not a concept governed by practical considerations, but is absolute.

The petitioners attempt to belittle the cases relied on by the Commission. The jurisdiction of the Commission covers abandonment, rates, charges, rules, and practices of every form and nature.

[fol. 245] Much is said in the petition regarding the Commission's prior concern over the issue. We respectfully suggest to the Commission that for the most part the cases cited by the petitioners were rendered by the Commission prior to the full development of the law and jurisdiction of this Commission by the Supreme Court in *News Syndicate Co.* v. *N. Y. Central R. Co.*, 275 U.S. 179, 48 S. Ct. 39; *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592 and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472.

What we have said applies equally to the jurisdiction of the Commission over the Canadian lines. We reiterate that the Commission has jurisdiction over the Canadian lines to the extent that they perform a transportation service in the United States. Defendants cannot escape from this conclusion. See Appendices A, B and C.

The order of the Commission is a cease and desist order coupled with an order to pay damages. The jurisdiction and authority of the Commission to award damages was thoroughly discussed by the Supreme Court in the *News Syndicate Case*. The legal theory supporting that authority was there clearly revealed.

In the case cited it was stated:

> Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this act for a violation thereof.' Section [fol. 246] 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

We also refer the Commission to the decision of the Supreme Court in the *Sullivan Case*. Combination rates

were there involved. The same legal theory was applied by the court as that applied in the *News Syndicate Case.*

It has often been said that Congress enacted the Interstate Commerce Act so as to prevent abuses of every form and description. Can it be said that the Commission is without authority to enter a cease and desist order to prevent carriers, subject to its jurisdiction, from continuing practices and policies which are clearly in violation of the law? Is the Commission so helpless? We think not.

The defendant railroads are maintaining joint through rates to official territory destinations. Certainly it is within the province of this Commission to prevent discriminations of all types and eliminate undue preferences. This it has done appropriately. The order runs to carriers performing a transportation service in the United States. It does not purport to tell the Canadian lines what they might do except to the extent that they perform a transportation service in the United States.

The petitioners alleged that the Commission has committed an error in that there is a "changed concept" of [fol. 247] Commission jurisdiction and that this concept has been made retroactive. In the first place there is no "changed concept" which has been spelled out by the Commission since the decisions of the Supreme Court in the three cases cited above were rendered. *What defendants are trying to do is to take statements out of context from Commission decisions rendered prior to the major Supreme Court cases in this field and benefit from the confusion which they themselves have created.*

The defendants were placed on actual notice as to their duties in this area ever since November 21, 1927, when the Supreme Court rendered its decision in *News Syndicate Co.* v. *N. Y. Central R. R. Co., supra.* Further, ever since May 25, 1931, the defendants were placed on actual notice as to the precise nature of the rate which must be maintained from the international boundary line which would reflect a charge for the transportation service rendered on an international shipment from the international boundary line, when the Supreme Court rendered its decision in *Lewis-Simas-Jones Co.* v. *Southern Pac. Co., supra.*

Reference by defendants to decisions of the Commission

which were made prior to a clear revelation of the law by the Supreme Court are of no value to the Commission or to the parties at this time. It is the law which is presently applicable in which we are interested, and that law is clear. Actually, the facts of record reveal that the defendants have not complied with the duty imposed on them by the Interstate Commerce Act and, as a result thereof, the com- [fol. 248] plainants have been unduly damaged.

### The Commission Did Not Commit an Error as to Matters of Fact

We have heretofore pointed out that the original complaint of the Thermoid Company not only alleged that the rates maintained to Chicago, Waukegan and Milwaukee were unjustly preferential and unjustly prejudicial to Thermoid at Charlotte, but it also made the same allegation in connection with rates maintained by defendants to points in official territory. The complaint did not have to be amended in any respect.

Now in regard to the contention that the rates to official territory are water and motor truck compelled, it need only be said that the record was clear that such is not the case and the Commission has so found.

The Commission and the courts in the past have made it plain that the best criteria with which to measure the lawfulness of any given assailed rates are the rates maintained on the same commodity in the same general areas and which apply on traffic moving under substantially similar transportation conditions. That is the criteria the Commission used in the instant case. The record shows conclusively that the assailed rates, insofar as they apply on transportation within the United States, are unlawful.

### Comments on Petitioners "Conclusion and Requested Findings"

Petitioners assume that they have published reasonable and lawful rates applicable from the border. This they [fol. 249] have not done. We reiterate that even if the tariffs of the defendant carriers had made the rates applicable from the international boundary line which are

now applicable from East Alburgh and Newport, still such rates would be unlawful since those rates include charges for two terminals. These rates are local rates and apply on traffic originating at the said points and, of course, if the rates were published to apply from the international boundary line, such rates would still reflect two terminals. In the *Lewis-Simas-Jones Case* the court made it clear that such rates would be unlawful.

The Petitioners say that the Commission is impractical and unrealistic in this case because if the decision of the Commission is to stand, the defendants would have to publish rates from the international boundary line. There is nothing whatsoever to this argument. The Commission is asked to take judicial notice of the Tariffs and certain Items which are on file at this moment with the Interstate Commerce Commission and shown herein as Appendices A, B and C. These items show that the defendants are publishing rates from the actual international boundary line. We make no comment as to the lawfulness of these rates since we do not know at this time whether or not the said rates inherently contain two terminal charges. We simply say that there is nothing to this argument advanced by the defendants.

We call the attention of the Commission to the fact that the Tariffs and Items shown in Appendices A and B show [fol. 250] conclusively the carriers transporting property within the United States to or from the international boundary. In the case of Derby Line, Vt., located just north of Newport, Vt., on the Quebec Central, the Items and Tariffs referred to in Appendices A and B show conclusively that it is the Quebec Central which performs the service from the international boundary line. Attention is also called to East Alburgh, Vt., which is located on the Central Vermont Railway. There it is shown that the carrier transporting the property within the United States to or from the international boundary line is the Grand Trunk-Eastern Lines.

Attention is also called to the provisions in connection with Rouses Point, N. Y. Here again it is conclusively shown that there is a transportation service performed in

the United States between Rouses Point and the international boundary line.

We believe that this is a complete answer to the defendants' argument that the Commission has no jurisdiction over these Canadian lines. By their own tariffs on file with this Commission—*They Admit*.

## Conclusion

We respectfully submit that the Commission has correctly decided the instant case. The Commission has had the benefit of extensive legal research on the part of both the defendants and the complainants. No doubt the Commission has made its own research for this is an important case and the issue of jurisdiction has been clearly drawn. The defendants elected to rely on the point of [fol. 251] jurisdiction and did not attempt to justify the assailed transportation charges insofar as they take place in the United States. Certainly it is that the Commission has not committed any errors in law or in fact. Complainants are entitled to reparation and also entitled to a cease and desist order as spelled out by the Commission in the instant case.

Wherefore, complainants respectively request the Commission to deny the Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.

Respectfully submitted,

Thermoid Company—Southern Division, Raybestos-Manhattan, Inc.—General Asbestos and Rubber Division, Union Asbestos and Rubber Company, Carolina Asbestos Company, By: E. B. Ussery, Harvey L. Golden, Attorneys, H. V. Fleming, Practitioner.

Due Date July 28, 1958

E. B. Ussery, Harvey L. Golden, Security Federal Building, Columbia 1, South Carolina.

H. V. Fleming, 111 Builders Building, 314 West Trade St., Charlotte, North Carolina.

[fol. 252]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by first class mail, a copy thereof properly addressed to each other party, dated at Columbia, South Carolina, July 24, 1958.

E. B. Ussery, Attorney.

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[fol. 253]

Appendix A

EXCERPT FROM TRUNK LINE TERRITORY TARIFF BUREAU (TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT), FREIGHT TARIFF NO. E/S-1008, I.C.C. NO. A-946 (Boin Series)

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Item 330B, page 4 of Supplement 49

APPLICATION OF RATES AND ROUTES TO AND/OR FROM THE INTERNATIONAL BOUNDARY BETWEEN UNITED STATES AND CANADA

The class rates and/or routes named in this tariff, from and or to points named below will apply also from and/or to the point in the United States located on the International Boundary adjacent to points named below at which the carrier transporting the property from Canada, or from the United States to or via said point, crosses the boundary.

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| Ashtabula, Harbor, Ohio | |
| PRR | Pa-OTCo. |
| Black Rock, N. Y. | |
| DL&W | C&O(PMD), GT-E, NYC(M), Wab. |
| Erie | GT-E, NYC(M), Wab. |
| GT-E | GT-E |
| NYC | GT-E, NYC(M), Wab. |
| Buffalo, N. Y. | |
| B&O | C&O(PMD), GT-E, NYC(M), Wab. |

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| Erie | C&O(PMD), GT-E, NYC(M), Wab. |
| GT-E | GT-E |
| NYC | GT-E, NYC(M), Wab. |
| NYC&StL | C&O(PMD), GT-E, NYC(M), Wab. |
| PRR | C&O(PMD), GT-E, NYC(M), Wab. |
| Constable, N. Y. | |
| NYC(E) | NYC(E) |
| Derby Line, Vt. | |
| QC | QC |
| Detroit, Mich. | |
| C&O(PMD) | C&O(PMD), GT-E, NYC(M), Wab. |
| D&TSL | C&O(PMD), GT-E, NYC(M), Wab. |
| DT&I | C&O(PMD), GT-E, NYC(M), Wab. |
| GT-W | GT-E, NYC(M) |
| NYC(M) | C&O(PMD), GT-E, NYC(M), Wab. |
| NYC(W) | C&O(PMD), GT-E, NYC(M), Wab. |
| PRR | C&O(PMD), GT-E, Wab. |
| Wab | C&O(PMD), GT-E, NYC(M), Wab. |

[fol. 254]

| | |
|---|---|
| East Alburgh, Vt. | |
| CVt | GT-E |
| Fort Covington, N. Y. | |
| GT-E | GT-E |
| Fort Fairfield, Me. | |
| CP(E) | CP(E) |
| Highgate Springs, Vt. | |
| CVt | CVt. |
| Houlton, Me. | |
| CP(E) | CP(E) |

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| Lowelltown, Me. | |
| CP(E) | CP(E) |
| Missisquoi, Vt. | |
| CP(E) | CP(E) |
| North Derby, Vt. | |
| QC | QC |
| North Troy, Vt. | |
| CP(E) | CP(E) |
| Norton, Vt. | |
| GT-E | GT-E |
| Ogdensburg, N. Y. | |
| NYC(E) | CPC-PT |
| Port Huron, Mich. | |
| C&O(PMD) | C&O(PMD), GT-E |
| GT-W | GT-E |
| Richford, Vt. | |
| CP(E) | CP(E) |
| CVt | CP(E) |
| Rouses Point, N. Y. | |
| CVt | (82)D&H, GT-E |
| GT-E | GT-E |
| Rut | (82)D&H, GT-E |
| D&H | (81)D&H, (80)GT-E |
| Rooseveltown, N. Y. | |
| NYC(E) | NYC(E) |
| Suspension Bridge, N. Y. | |
| Erie | C&O(PMD), GT-E, NYC(M), Wab. |
| GT-E | GT-E |
| LV | C&O(PMD), (76)GT-E(75) LV, NYC(M)(76) Wab. |
| NYC(W) | C&O(PMD), GT-E, NYC(M), Wab. |
| [fol. 255] | |
| Van Buren, Me. | |
| B&Ar | B&Ar. |
| Vanceboro, Me. | |
| CP(E) | [redacted]P(E) |
| MeC | CP(E) |

(76) On traffic for delivery to LV.

(75) On traffic for delivery to GT-E or Wab.

(80) Applicable only on traffic interchanged between D&H and GT-E.

(81) Applicable only on traffic interchanged between D&H and NJ.

(82) Applicable only on traffic interchanged between CVt or Rut on one hand and NJ on the other.

[fol. 256] Appendix B

EXCERPT FROM TRUNK LINE TERRITORY TARIFF BUREAU, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT, TARIFF 44-I, I.C.C. A-800 (Boin Series)

Item 665B, page 17 of Supplement 244

APPLICATION OF RATES AND ROUTES TO AND/OR FROM THE INTERNATIONAL BOUNDARY BETWEEN UNITED STATES AND CANADA

The class rates and/or routes named in this tariff, from and/or to points named below will apply also from and/or to the point, in the United States located on the International Boundary adjacent to points named below at which the carrier transporting the property from Canada, or from the United States to or via said point, crosses the boundary.

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| Black Rock, N. Y. | |
| DL&W | C&O(PMD), GT-E, NYC(M), Wab. |
| Erie | GT-E, NYC(M), Wab. |
| GT-E | GT-E |
| NYC | GT-E, NYC(M), Wab. |
| Buffalo, N. Y. | |
| B&O | C&O(PMD), GT-E, NYC(M), Wab. |
| Erie | C&O(PMD), GT-E, NYC(M), Wab. |
| GT-E | GT-E |

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| NYC | GT-E, NYC(M), Wab. |
| NYC&StL | C&O(PMD), GT-E, NYC(M), Wab. |
| PRR | C&O(PMD), GT-E, NYC(M), Wab. |
| Constable, N. Y., NYC(E) | NYC(E) |
| Derby Line, Vt. QC | QC |
| East Alburgh, Vt. CVt. | GT-E |
| Fort Covington, N. Y. GT-E | GT-E |
| Fort Fairfield, Me. CP(E) | CP(E) |
| Highgate Springs, Vt. CVt. | CVt. |
| Houlton, Me. CP(E) | CP(E) |
| Missisquoi, Vt. CP(E) | CP(E) |
| North Derby, Vt. QC | QC |
| [fol. 257] | |
| North Troy, Vt. CP(E) | CP(E) |
| Norton, Vt. GT-E | GT-E |
| Ogdensburg, N. Y. NYC(E) | CPC-PT. |
| Richford, Vt. CP(E) | CP(E) |
| CVt | CP(E) |
| Rouses Point, N. Y. CVt | e D&H, GT-E |
| GT-E | GT-E |
| Rouses Point, N. Y. Rut | e D&H, GT-E |
| D&H | d D&H, e GT-E |

| International Boundary Adjacent to | Carrier transporting property within the United States to or from International Boundary |
|---|---|
| Rooseveltown, N. Y. | |
| NYC(E) | NYC(E) |
| Suspension Bridge, N. Y. | |
| Erie | C&O(PMD), GT-E, NYC(M), Wab. |
| GT-E | GT-E |
| LV | C&O(PMD), b GT-E, a LV, NYC(M), b Wab. |
| NYC(W) | C&O(PMD), GT-E, NYC(M), Wab. |
| Van Buren, Me. | |
| B&Ar. | B&Ar. |
| Vanceboro, Me. | |
| CP(E) | CP(E) |
| MeC | CP(E) |

a—On traffic delivery to GT-E or Wab.
b—On traffic for delivery to LV.
c—Applicable only on traffic interchanged between D&H and GT-E.
d—Applicable only on traffic interchanged between D&H and NJ.
e—Applicable only on traffic interchanged between CVT or Rut on one hand and NJ on the other.

[fol. 258] Appendix C

EXCERPT FROM NEW ENGLAND TERRITORY RAILROADS TARIFF BUREAU, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT, TARIFF 47-E, I.C.C. 610 AND SUPPLEMENT 82 THERETO:

Item 290-A, page 14 of Supplement 82

PAPER, NEWSPRINT, FROM THE INTERNATIONAL BOUNDARY—APPLICATION OF RATES

The rates and routes named in this tariff on Newsprint Paper, carloads, from Ogdensburg, N. Y., and Rouses Point, N. Y., will apply also from the station located on the International Boundary adjacent to Ogdensburg, N. Y., and Rouses Point, N. Y., at which the carriers transporting the property from Canada, to or via said station, crosses the boundary.

[fol. 259] [File endorsement omitted]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. 30846*

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THERMOID COMPANY—SOUTHERN DIVISION,

v.

THE BALTIMORE AND OHIO RAILROAD CO., ET AL.

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REPLY OF COMPLAINANTS—Filed March 11, 1959
(To Petitions of Defendants dated February 20, 1959.)

---

E. B. USSERY,
HARVEY L. GOLDEN,
*Attorneys,*
Security Federal Building,
Columbia, S. C.

H. V. FLEMING,
*Practitioner,*
111 Builders Building,
314 West Trade St.,
Charlotte, N. C.

Dated at:
Columbia, S. C.,
March 4th, 1959.
Due Date: March 12, 1959.

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* Also embraces No. 31683, Raybestos-Manhattan, Inc., General Asbestos and Rubber Division v. Baltimore & Ohio R. R. Co.; No. 31684, Thermoid Company—Southern Division v. Same; No. 31685, Union Asbestos & Rubber Co. v. Same; No. 31686, Carolina Asbestos Co. v. Same.

[fol. 260] Come now the complainants in the above-entitled proceedings and file this their reply to the petition of the defendants for leave to file a petition seeking reopening and reconsideration, and, to petition of defendants for reopening and reconsideration, both being dated February 20, 1959.

Complainants respectfully request the Commission to refuse to entertain the petitions of February 20, 1959, filed by the defendants in these proceedings on the grounds that said petitions constitute successive petitions in violation of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. Complainants further request that should the Commission entertain the said petitions, it deny them as it did the petition of June 13, 1958, by order dated December 10, 1958.

[fol. 261] I

The defendants' pleadings of February 20, 1959, constitute a successive petition under the provisions of Rule 1.101 of the Commission's General Rules of Practice by the same parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission. The February 20, 1959, pleadings make it clear that these same petitioners by petition dated June 13, 1958, sought the reopening and reconsideration of these proceedings on the ground that the report of the Commission was in error as to matters of law. It is conceded by the petitioners that the June 13, 1958, petition was denied by order of the Commission dated December 10, 1958.

In the February 20, 1959, "Petition For Leave To File a Petition On Behalf of The Defendants Seeking Reopening And Reconsideration" the justification offered for filing a successive petition under Rule 1.101 is that the Commission on October 30, 1958, rendered a decision in *Yellow Jacket Boat Company, Inc.*, v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, and that the position of the Commission in the stated case is completely at vari-

ance and wholly irreconcilable with the position taken by the Commission in the instant case.

We have studied the decision of the Commission in the *Yellow Jacket Case, supra,* and conclude the contention of the defendants is without merit. All the Commission there held was where shipments originate at a Canadian point beyond the border and moves on local rates from the border to destinations in this country "the complaint *need not be directed to the rate on the through movement,* but may be directed to the local rate or rates from international bound- [fol. 262] ary:" The complainant had alleged that the local rates from the international boundary to Denison, Texas, was in violation of Section 1 of the Act. The attack was centered upon the domestic rates. The Commission had awarded reparation and the defendants contended that the Commission was without authority to award reparation since the complainant had failed to allege that the through rate or charge was in violation of Section 1 of the Act. The Commission disposed of the contention on the theory that a local rate is complete in itself and since the entire local rate which was assailed was subject to the jurisdiction of the Commission, it was unnecessary for the complainant to attack the through rate. The language used by the Commission makes it plain that the complainant could have proceeded by attacking the through rate. The complainant elected, however, to attack only the local rate and the Commission held that this was permissive.

There is no merit in the contention that the Commission in the *Yellow Jacket case* held that a complaint, if a local rate from the international boundary is involved, *must be directed to the local rate* and not to the through rate on the through movement. This issue was not even before the Commission.

The petition of defendants for reopening and reconsideration dated February 20, 1959, is founded identically upon the same grounds as the former petition of June 13, 1958. Point II of the pleading constitutes the entire pleading other than the "Resume of the Proceeding" and "Conclusion and Requested Findings." Point II alleges that "The Re-

port and Orders Are in Error as to Matters of Law." Petitioners in the June 13, 1958, pleading devoted 47 pages to identically the same point. The only noticeable difference [fol. 263] from a substantive standpoint is that in the February 20, 1959, petition the petitioners deal profusely with the *Yellow Jacket case, supra,* and claim that the decision in the instant case is in direct conflict with the *Yellow Jacket case.* There is no merit in this contention.

II

The entire Commission decided the instant case on May 7, 1958, and the defendants were given until August 14, 1958, to comply with the order entered therein. The petitioners on June 13, 1958, by a duly filed petition requested reopening and reconsideration. The effective date of the order entered on May 7, 1958, was postponed from time to time by the Commission at the request of the petitioners. The order of the Commission denying the petition was entered on December 10, 1958, but through inadvertance was not served on the parties until some time during the first part of January. At that time the defendants were under order to establish the rates ordered by the Commission on or before February 24, 1959. Due to the inadvertance the Commission by order dated January ....., 1959, extended the effective date to March 26, 1959. The original order and all subsequent modifications of the same required that the new rates be made effective on not less than 30 days' notice to the public. Only a few days ago the petitioners requested the Commission to modify the outstanding order so as to permit them to establish the required rates on 10 days' notice to the public. This request the Commission granted.

Conclusion

From the record it is obvious that the petitioners are employing dilatory tactics. They seek to intimidate the Commission and discourage the complainants. At the [fol. 264] Charlotte hearing counsel for the defendants

threatened to involve this Commission and complainants in court litigation if the decision of the Commission in the instant case was not to his liking. This threat was renewed in the June 13, 1958, petition and again in the February 20, 1959, petition at pages 7 and 8. It is stated, and we paraphrase, "We are going to give you another chance to agree with us."

Complainants respectfully submit that the time has come for this litigation to come to an end before this administrative tribunal. Due process of law has been enjoyed by all parties. The entire Commission had ruled twice on the issues involved. Further delay is not justified. The instant petitions violate the provision of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. *They should not be entertained.*

Complainants have filed this reply immediately upon receipt of the petitions of February 20, 1959. It is requested that the Commission act immediately on the said petitions and this reply. The required rates under the last order of the Commission must be published and filed with this Commission on or before March 16, 1959, in order for them to become effective on March 26, 1959. Justice requires swift and sure action.

In the event the Commission, in its wisdom, entertains the petitions, then it is respectfully requested that the Commission consider the legal arguments heretofore advanced by the complainants in their Brief of May 14, 1956, in their Reply to the Defendants' Exceptions to the Examiner's Proposed Report, and in their Reply of July 28, 1958, to Petition of Defendants dated June 13, 1958. Complainants feel that it is unnecessary to deal further with the legal argument.

[fol. 265] *Wherefore*, complainants respectfully request the Commission to refuse to entertain the petitions of February 20, 1959, filed by the defendants in these proceedings on the grounds that said petitions constitute successive petitions in violation of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. Complain-

ants further request that should the Commission entertain the said petitions, it deny them as it did the petition of June 13, 1958, by order dated December 10, 1958.

Respectfully submitted,

Thermoid Company—Southern Division,
Raybestos-Manhattan, Inc.—General Asbestos and Rubber Division,
Union Asbestos and Rubber Company,
Carolina Asbestos Company,
By: E. B. Ussery,
Harvey L. Golden,
*Attorneys.*

H. V. Fleming,
*Practitioner.*

Due Date: March 12, 1959.

E. B. Ussery,
Harvey L. Golden,
Security Federal Building,
Columbia 1, South Carolina.

H. V. Fleming,
111 Builders Building,
314 West Trade St.,
Charlotte, North Carolina.

[fol. 266] Certificate of Service (omitted in printing).

[fol. 267] At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D., 1959

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No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

---

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

---

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

---

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

---

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

---

ORDER DENYING PETITION FOR RECONSIDERATION—
March 11, 1959

*It appearing,* That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

*It further appearing,* That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

*It is ordered,* That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

*It is further ordered,* That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 268] *And it is further ordered,* That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 269]

IN THE UNITED STATES DISTRICT COURT

HELD AT BURLINGTON, VERMONT

[Title omitted]

ORDER PERMITTING WITHDRAWAL OF CERTAIN PARTIES—April 3, 1959

Upon the annexed Stipulation of Counsel and upon consideration of the matters contained therein, now upon motion of Horace H. Powers, Esq., Attorney for the Plaintiffs herein, it is

Ordered, Adjudged and Decreed, that the following named rail carriers among those listed in Appendix A to the Complaint filed in this case, be and they hereby are withdrawn and dropped as parties plaintiff, without prejudice, to wit:

The Alabama Great Southern Railroad Company

Atlantic Coast Line Railroad Company

The Cincinnati, New Orleans & Texas Pacific Railway Company

New Orleans & Northeastern Railroad Company

Norfolk Southern Railway Company

Seaboard Air Line Railroad Company

Southern Railway Company

Ernest W. Gibson, United States District Judge.

Endorsed: Filed April 3, 1959. Arnold A. Murray, Clerk.

[fol. 270]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

[Title omitted]

ORDER CONVENING THREE JUDGE STATUTORY COURT—
Filed April 8, 1959

There having been presented to the undersigned a complaint of plaintiffs, filed in this Court on the 12th day of March, 1959, wherein plaintiffs apply for a decree permanently suspending, enjoining, setting aside and annulling certain orders of the Interstate Commerce Commission dated May 7, 1958, and February 19, 1959, in a proceeding before it known as Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company, et al*, which also embraces Docket No. 31683, *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al;* Docket No. 31684, *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al;* Docket No. 31685, *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al;* and Docket No. 31686, *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al*, and the law requiring and the plaintiffs praying in their complaint that a court of three judges be constituted to hear and determine this cause, and the undersigned having given notice of plain- [fol. 271] tiffs' complaint as required by law to the Honorable Charles E. Clark, Chief Judge of the United States Court of Appeals for the Second Circuit, with the request that he designate two other judges, at least one of whom shall be a Circuit Judge, to constitute, with the undersigned, the Court to hear and determine this cause, and Chief Judge Charles E. Clark, having designated Honorable Sterry R. Waterman, a Judge of the United States Court of Appeals for the Second Circuit, and Honorable James T. Foley, a Judge of the United States District Court for the Northern District of New York, it is hereby

Ordered, that the Honorable Sterry R. Waterman, the Honorable James T. Foley and the undersigned shall serve

as members of and shall constitute the Court to hear and determine this cause and to act in all matters pertaining thereto as provided by law, and that this cause shall come on for hearing before the said Court at such time or times as shall hereafter be fixed upon due notice to the parties.

Ernest W. Gibson, U.S.D.J.

Dated, Brattleboro, Vermont, April 8, 1959.

[File endorsement omitted]

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[fol. 272]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed May 9, 1959

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled proceeding, for answer to the complaint, state:

1.

Admit the allegations of paragraphs I through VI.

2.

Admit the allegations of paragraph VII, except that the Court is respectfully referred to the complaint filed before the Commission in Docket No. 30846 for the contents thereof.

3.

Admit the allegations of paragraph VIII, except that the Court is respectfully referred to the proposed report of the examiner and the report of the Commission, Division 3, for the contents thereof.

4.

Admit the allegations of paragraph IX.

[fol. 273] 5.

Admit the allegations of paragraph X, except that the Court is respectfully referred to the complaints filed by the parties before the Commission for the contents thereof.

6.

Admit the allegations of paragraph XI.

7.

Admit the allegations of paragraph XII, except that the Court is respectfully referred to the report of the Commission for a complete and accurate statement of its findings and conclusions.

8.

Admit the allegations of paragraphs XIII and XIV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings with respect to the basis for determination of reparations and the nature of the preferential rates.

9.

Admit the allegations of paragraph XV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings and conclusions regarding its jurisdiction over the assailed rates.

10.

Admit the allegations of paragraph XVI, except that the Court is respectfully referred to the order of the Commission dated May 7, 1958, for the contents thereof.

11.

Admit the allegations of paragraphs XVII through XIX.

[fol. 274] 12.

Admit the allegations of paragraph XX, except the last sentence, with respect to which defendants aver that the Commission by order dated March 11, 1959, granted the

petition for leave to file a petition seeking reopening and reconsideration, denied the petition for reopening and reconsideration, and clarified the report and order of the Commission as indicated in the order of the Commission dated March 11, 1959, which is attached hereto as the Appendix.

13.

Deny the allegations of paragraph XXI.

14.

Deny the allegations of paragraph XXII, except that the defendants aver that any injuries which may occur to plaintiffs resulting from the lawful and valid orders of the Commission do not constitute a legal basis for instituting or maintaining this suit.

15.

For further answer to the allegations of the complaint, deny that the actions of the Commission challenged in the complaint are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and further aver that the orders of the Commission under attack are valid in all respects.

Except as herein expressly admitted, deny each and every allegation contained in the complaint.

Wherefore, the United States of America and the Inter- [fol. 275] state Commerce Commission pray that the relief prayed for in the complaint be denied and that the complaint be dismissed, and that costs be assessed against the plaintiffs.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.
Robert A. Bicks, Acting Assistant Attorney General.
Louis G. Whitcomb, United States Attorney, Rutland, Vermont.
Attorneys for the United States of America.

H. Neil Garson, Associate General Counsel, Interstate Commerce Commission.
Robert W. Ginnane, General Counsel.
Attorneys for Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 276]

APPENDIX TO ANSWER

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 11th day of March, A. D., 1959.

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No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

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No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

---

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

---

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

---

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

---

*It appearing*, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

*It further appearing*, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

*It is ordered*, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

*It is further ordered*, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 277] *And it is further ordered*, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

Harold D. McCoy, Secretary.

(SEAL)

[File endorsement omitted]

[fol. 278]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

MOTION AND NOTICE OF MOTION OF H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY; FOR LEAVE TO INTERVENE—Filed May 13, 1959

Now Come H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, and move that they be permitted to intervene in this case. As grounds for the motion, petitioners state:

1. That they were parties in interest to the proceedings before the Interstate Commerce Commission in Docket Nos. 30846, 31683, 31684, 31685, and 31686.

2. They have a substantial financial interest in the proceedings.

3. That intervention is necessary in order to permit them to assert the claims and defenses which they deem appropriate in support of their position and legal interests.

4. That a statute of the United States gives petitioners an unconditional right to intervene inasmuch as they were parties in interest to the proceedings before the Interstate [fol. 279] Commerce Commission (28 USCA 2323).

Petitioners' Answer is attached to this Motion.

Dated at the City of Rutland, County of Rutland and State of Vermont this 12th day of May, A. D. 1959.

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; Carolina Asbestos Company, By John D. Carbine, A Member of the Firm of Ryan, Smith & Carbine, Mead Building, Rutland, Vermont, Attorney for Petitioners for Intervention.

E. B. Ussery, Of Counsel, 608 Security Federal Building, Columbia, South Carolina.

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[fol. 280]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

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CENTRAL VERMONT RAILWAY, INC., ET AL.

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

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ANSWER OF INTERVENORS, H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY—Filed May 13, 1959

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company;

and Carolina Asbestos Company, intervenors in the above entitled proceeding, for answer to the complaint, state:

1.

Admit the allegations of paragraphs I through VI.

2.

Admit the allegations of paragraph VII, except that the Court is respectfully referred to the complaint filed before the Interstate Commerce Commission in Docket No. 30846 for the contents thereof.

3.

Admit the allegations of paragraph VIII, except that the Court is respectfully referred to the proposed report of the examiner and the report of the Commission, Division 3.

[fol. 281]

4.

Admit the allegations of paragraph IX.

5.

Admit the allegations of paragraph X, except that the Court is respectfully referred to the complaints filed by the parties before the Commission for the contents thereof.

6.

Admit the allegations of paragraph XI.

7.

Admit the allegations of paragraph XII, except that the Court is respectfully referred to the report of the Commission for a complete and accurate statement of its findings and conclusions.

8.

Admit the allegations of paragraphs XIII and XIV, except that the Court is respectfully referred to the report

of the Commission for a statement of its findings with respect to the basis for determination of reparations and the nature of the preferential rates.

9.

Admit the allegations of paragraph XV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings and conclusions regarding its jurisdiction over the assailed rates.

10.

Admit the allegations of paragraph XVI, except that [fol. 282] the Court is respectfully referred to the order of the Commission dated May 7, 1958, for the contents thereof.

11.

Admit the allegations of paragraphs XVII through XIX.

12.

Admit the allegations of paragraph XX, except the last sentence, with respect to which intervenors aver that the Commission by order dated March 11, 1959, granted the petition for leave to file a petition seeking reopening and reconsideration, denied the petition for reopening and reconsideration, and clarified the report and order of the Commission as indicated in the order of the Commission dated March 11, 1959, which is attached hereto as the Appendix.

13.

Deny the allegations of paragraph XXI.

14.

Deny the allegations of paragraph XXII, except that the intervenors aver that any injuries which may occur to plaintiffs resulting from the lawful and valid orders of the Commission do not constitute a legal basis for instituting or maintaining this suit.

15.

For further answer to the allegations of the complaint deny that the actions of the Commission challenged in the complaint are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and further [fol. 283] aver that the orders of the Commission under attack are valid in all respects.

Except as herein expressly admitted, deny each and every allegation contained in the complaint.

16.

The intervenors have been illegally charged discriminatory rates and the Interstate Commerce Commission found that they were entitled to reparations in the amount of the difference between the charges collected and those which would have accrued on the bases found by the Commission to be just and reasonable.

Wherefore intervenors pray that the relief prayed for in the complaint be denied and that the complaint be dismissed, and that costs be assessed against the plaintiffs.

Dated at the City of Rutland, County of Rutland and State of Vermont this 12th day of May, A. D. 1959.

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; Carolina Asbestos Company, By John D. Carbine, A Member of the Firm of Ryan, Smith & Carbine, Mead Building, Rutland, Vermont, Attorney for Intervenors.

E. B. Ussery Of Counsel, 608 Security Federal Building, Columbia, South Carolina.

[fol. 284]

APPENDIX TO ANSWER

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 11th day of March, A. D., 1959.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

*It appearing,* That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

*It further appearing,* That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

*It is ordered,* That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

*It is further ordered,* That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 285] *And it is further ordered,* That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

[fol. 286] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 287] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

[Title omitted]

ORDER GRANTING PETITIONERS' MOTION TO INTERVENE—
Filed May 23, 1959

Upon consideration of Petitioners' Motion to Intervene filed May 13, 1959, it is

Ordered: Motion granted. Motion to Intervene allowed accordingly.

Done in Court at Brattleboro, in the District of Vermont, this 22 day of May, 1959.

Ernest W. Gibson, United States District Judge.

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[fol. 288]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

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CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

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Argued July 9, 1959.
Finally submitted on briefs, November 1, 1959.
Decided March 7, 1960.

Before: Waterman, Circuit Judge, Foley and Gibson, District Judges.

Horace H. Powers, St. Albans, Vermont: (J. Raymond Hoover, Washington, D.C.; J. Edgar McDonald, New York City; William H. Parsons, Washington, D. C.; John F. Reilly, New York City, of counsel) for Plaintiffs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, for Interstate Commerce Commission.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington, D. C.; Louis C. Whitcomb, U. S. Attorney for Vermont, Rutland, Vermont, for United States of America.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) for Intervenors.

OPINION—March 7, 1960

[fol. 289] WATERMAN, *Circuit Judge*:

Ninety-one railroads[1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriage of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and south-

[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958 that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958 Order.

west approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American users. The asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the [fol. 290] southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte,

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[3] In railroad parlance, a *joint* rate on a through route differs from a *combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See Louisville and N.R.R. v. Sloss-Sheffield Co., 269 U.S. 217 (1925) at pp. 231-234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See Lewis-Simas-Jones Co. v. Southern Pacific R. Co., 283 U.S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainants' contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded [fol. 291] its power in failing to limit its jurisdiction to

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[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U.S.C. §2323.

[6] Under 28 U.S.C. §2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those ". . . for the payment of money or the collection of fines, penalties and forfeitures . . ." Under 49 U.S.C. §16(a) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts or in a state court. In United States v. ICC, 337 U. S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

the local rate factor from the points of border interchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§1(1)(a), and 1(2). These sections in pertinent part read as follows:

> "Carriers subject to regulation
>
> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, . . .
>
> . . . .
>
> . . . "from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*"
>
> "Transportation subject to regulation
>
> "(2) The provisions of this chapter shall also apply to such transportation of passengers and property . . . *but only in so far as such transportation* or transmission *takes place within the United States* . . ." (Italics supplied.)

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654, 660 (1931); *Fruit Importers* v. *Atlantic*

*Coast Line R. Co.*, 188 ICC 520, 523 (1932); *International Nickel Co. v. Director General*, 66 ICC 627 (1922). However, it is equally well settled that the Commission does [fol. 292] have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation . . . takes place within the United States."[7] See *Black Horse Tobacco Co. v. Illinois Central R. Co.*, 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co. v. Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commis-

[7] Prior to February 28, 1920 Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a port of transshipment; (4) from a foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In Galveston, H. & S. A. R. Co. v. Woodbury, 254 U.S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920 (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

sion's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U.S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654 (1931).[8]

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation. The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[9] In its decision the Commission made no findings that the local rates south of the interchange points [fol. 293] were unreasonable or prejudicial. The Commission, nevertheless, held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred

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[8] There is language in News Syndicate, supra, at 186-87, and Lewis-Simas-Jones, supra, at 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction over joint rates, irrespective of whatever additional rates may be filed. Carstens Packing Co. v. Great Northern R. Co., 264 ICC 164 (1945); see also Cyanamid and Cyanide from Niagara Falls, Ont., 155 ICC 488 (1929); Publication of Rates between United States and Canada, 147 ICC 778 (1928).

[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

within the United States.[10] The Commission stated its position in the following words:

> "The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary.] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States."

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada.[11] It is now settled that the Commission need not make this distinction if the inter-

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[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

[11] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

national transportation is conducted on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each [fol. 294] publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.[12]

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position. The Commission relied upon *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper to Detroit*, 161 ICC 63 (1930); *Simpson Co.* v. *Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co.* v. *Chatham W. & L. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N.Y. to Kitchener, Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925) and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, News-*

[12] See note 10, supra.

*print to Detroit, Simpson Co.*, and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* [fol. 295] the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5(a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N. Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate.[13] In *Albee Fruit*

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[13] Watab Paper Co. v. Canadian National R. Co., 152 ICC 265 (1929) appears to be the single exception to the above statement. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation, resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commis-

*Co.* v. *Atlantic Coast Line R. Co.*, 293 ICC 785, Montreal consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N. Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950) involved rates on shipments of aqua ammoniae from originating points in Canada to Springfield, Missouri. The rates were com- [fol. 296] bination rates made over Detroit and Fort Huron, Michigan, and apparently the complaint attacked only the Canadian portion of the rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton* v. *Atchison, T. & S. F. R. Co.*, 258 ICC 315 (1944) the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co.* v. *Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten* v. *Railway Express*, 201 ICC 284 (1934); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520 (1932).

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sion recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States *is based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" (Italics supplied).

In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351-52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co.* v. *Sullivan*, 294 U.S. 458 (1935). The *Sullivan* case in-[fol. 297] volved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada. The shipments moved on a combination rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, i.e., the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's-land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to

lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional [fol. 298] rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra*, are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

Sterry R. Waterman, U. S. Circuit Judge.

I concur:

James T. Foley, U. S. District Judge.

I concur:

Ernest W. Gibson, U. S. District Judge.

[File endorsement omitted]

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[fol. 302]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

MOTION OF UNITED STATES AND INTERSTATE COMMERCE COMMISSION FOR RECONSIDERATION AND TO ALTER OR AMEND THE JUDGMENT—Filed March 17, 1960

Now come the United States of America and the Interstate Commerce Commission, defendants in the above-styled action, and move the Court, pursuant to Rules 52(b) and 59(e), 28 U.S.C., Federal Rules of Civil Procedure, to open the judgment herein to grant reconsideration and to alter or amend the judgment on the following grounds:

I.

The Court's opinion does not discuss a primary issue in this case, namely, whether the Commission has the authority to order the rail carriers involved in this case to discontinue the maintenance of an unlawful rate relationship which is unduly preferential to certain points in Official Territory and unduly prejudicial to certain points in Southern Territory in violation of section 3 of the Interstate Commerce Act, 49 U.S.C. §3.

[fol. 303]

II.

The effect of the Court's opinion is to immunize from regulation precisely what section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1) has empowered the Commission to prevent, i.e., undue and unreasonable prejudice and disadvantage between points and territories. Thus, this opinion would insulate from section 3 of the Act the action of rail carriers operating within the United States which participate in joint rates from points in Canada to certain points in the United States, although refusing to participate in joint rates from the same Canadian origins to other points in the United States. There is no court decision which holds that the Commission's power under section 3 of the Interstate Commerce Act is so circumscribed that it cannot reach this kind of rate discrimination. Nor is there any Commission decision which holds that the Commission's power is so restricted. The fact that the Commission does or does not have jurisdiction with respect to the rates in the area between the International Boundary and the interchange points does not determine the issue of the Commission's jurisdiction to enter the section 3 order which it did in the instant case. Even if it be assumed *arguendo* that the Commission does not have jurisdiction under section 1 of the Act over transportation from the International Boundary to the interchange points involved here, it is submitted that the Commission unquestionably has jurisdiction under section 3 to find that the fact that points in Official Territory have joint rates from Canadian origins while competing points in Southern Territory do not have joint rates from the same origins creates an undue prejudicial-preferential-rate relationship in violation of sec-

[fol. 304] tion 3 of the Act and, accordingly, to order railroads operating within the United States not to continue to participate in such joint rates to one territory unless comparable rates are also established to the other territory.

III.

There is nothing in the Interstate Commerce Act which supports the distinction made by the Court at pages 10-11 of its opinion with respect to the Commission's jurisdiction over the Canadian carriers operating in the United States in regard to finance matters (such as abandonment proceedings) as against rate matters. We submit that once physical jurisdiction is obtained over the rail carriers that such jurisdiction extends to all matters within the purview of the Interstate Commerce Act. Further, it cannot be overemphasized that the effect of the Court's decision is not only that the Commission lacks jurisdiction under section 1 of the Act to hold that the rates to the South are unreasonable, but also that the Commission lacks jurisdiction under section 3 of the Act to order the rail carriers operating in the United States to discontinue participation in joint rates from Canadian origins to points in Official Territory unless joint rates are established from the same Canadian origins to points in Southern Territory.

IV.

Under the Court's determination of the Commission's jurisdiction, none of the rates which have been established by the Canadian carriers applicable between the International Boundary and the interchange points would be subject to the Commission's jurisdiction. Even the Canadian carriers did not make such an allegation either before the Commission or this Court. As a matter of fact, the Cana-[fol. 305] dian carriers from the beginning have filed with the Commission all of their tariffs, class rates, commodity rates, local and others, applicable from points in Canada to the interchange points and between the International Boundary and the interchange points. When the Canadian carriers deemed it necessary, they have applied to the Commission pursuant to section 6 of the Act for permis-

sion to publish tariffs effective on less than the statutory 30 days' notice period. Under the Court's opinion, this would be no longer required of the Canadian carriers for operations between the International Boundary and the interchange points, or from a point in Canada to the interchange points on traffic for local delivery or otherwise. Examples of such tariffs are Tariff No. I.C.C. 444, Quebec Central Railway Company Local Freight Tariff of Class Rates between Quebec Central Railway Stations in the State of Vermont and between those stations and the International Boundary Line. This tariff was published in compliance with the order of the Commission in I.C.C. Docket No. 28300, dated May 15, 1945, as amended; the Sixth Section matter is illustrated by rates on maple sugar from Sherbrooke, Quebec, to Newport, Vermont, for local delivery, Supplement No. 2 to Quebec Central Tariff No. 155-C, I.C.C. No. 452, issued on 10 days' notice under authority of the Commission, Special Permission No. 69072, dated May 29, 1956.

V.

The effect of the Court's ruling will be to establish a no man's land between the International Boundary and the interchange points within the territorial limits of the United States with respect to rates, thus enabling the rail carriers not only to maintain unreasonable rates but also to perpetrate rate discriminations at will, free from control by [fol. 306] the Interstate Commerce Commission. This would create a loophole in the law which, we submit, is not required by the terms of the Interstate Commerce Act, and which would frustrate one of the underlying objectives of the Act, i.e., the elimination of unlawful discrimination between shippers and territories. See *Houston & Texas Ry. Co. v. U.S.*, 234 U.S. 342, at pages 356, 358-360.

VI.

The Court at page 6 of its opinion stated:

> First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no

effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada. * * *

We submit that this statement overlooks two important factors: (1) The Commission did not rule on the lawfulness of the rates from the interchange points to destinations in the South because the complaints before the Commission did not attack the local rates, but were based upon the ground that the rail carriers were unlawfully maintaining unreasonable and discriminatory rates from the Canadian origins to the Southern points by failing to maintain reasonable joint rates to these destination points comparable to those maintained from the same Canadian origins to destinations in Official Territory; and (2) In any case, such a finding could not be made because the rail carriers, in violation of section 6 of the Act, failed to publish rates applicable from the International Boundary to the interchange points and from the International Boundary to points in the South.

[fol. 307] VII.

In any event so far as section 3 of the Act is concerned, the Commission was not required to determine what would have been a reasonable rate from the International Boundary or the interchange points to the South. See *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 666, 667. The complaints before the Commission charged that there was a violation of section 3 in that the rail carriers failed to maintain joint rates from the Canadian origins to destinations in the South while maintaining such rates from the same origins to competitive points in Official Territory. The Commission determined that the carriers operating within the United States violated section 3 of the Interstate Commerce Act in this respect, and gave them the alternative of discontinuing the discrimination either by terminating the joint rate arrangements, or by establishing similar rates to the South.

## VIII.

While the Court's opinion holds that the assailed rates to the South do not come within the jurisdiction of the Commission since they are not joint rates, nevertheless, the rail carriers operating in the United States are participating in a through route, and to this extent such transportation, we submit, would be subject to the Interstate Commerce Commission's regulatory powers. *Thompson* v. *United States*, 343 U.S. 549; *United States* v. *Great Northern R. Co.*, 343 U.S. 562; *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233; *United States* v. *Illinois Central R. Co.*, 263 U.S. 515; *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 139. This Court recognizes that railroads which participate in joint rates are jointly and severally liable if the rates [fol. 308] are unlawful, and that, therefore, if the rail carriers had established joint rates from Canadian origins to the South, they would have been liable for any unlawfulness in such rates. The underlying basis for such liability, as stated by the Supreme Court, is that " * * * the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement." *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233. Under the same reasoning, carriers that participate in a through route and a through rate, even though such a rate is a combination rate, are also jointly and severally liable if the through rate is unlawful, for the through route " * * * is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *Thompson* v. *United States*, 343 U.S. 549, 556. Here the rail carriers have established through routes and rates from Canadian origins to southern destinations. This traffic is transported on a single bill of lading from origin to destination, and the freight charges are collected by the Canadian rail carriers, which they remit to the United States carriers as their part of the through rate.

## IX.

The Court's opinion, in footnote 11, states that it interprets certain language of the Commission—

> * * * to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

[fol. 309] This assertion is accurate and one reason for this is that the rail carriers are, in fact, participating in through routes and rates from the Canadian origins to destinations in the South, and for this reason they are jointly and severally liable for the unlawfulness of the through rates. *Thompson* v. *United States, supra; United States* v. *Great Northern, supra; L. & N.R.R.* v. *Sloss-Sheffield Co., supra.*

## X.

The Court at page 7 of its opinion states that " * * * the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side is a fortuitous event, an event upon which the Congress could hardly have intended the Commission's jurisdiction to hinge." However, the Commission made the specific finding that the transportation performed by the Canadian carriers from the International Boundary to the interchange points involved here is substantial. See 303 I.C.C. 743, page 752. We submit that this is a rational finding, and therefore that, in accordance with firmly established principles of judicial review, it should have been left standing. This position is reinforced by the fact that the statute itself does not exempt from its scope any territory within the United States even though that territory happens to be adjacent to the International Boundary.

For the foregoing reasons, it is respectfully submitted that the judgment for the plaintiffs should be vacated and

[fol. 310] set aside and judgment should be entered for the defendants.

Robert W. Ginnane, General Counsel, H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert A. Bicks, Acting Assistant Attorney General, Louis G. Whitcomb, United States Attorney, Rutland, Vermont, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Certificate of Service (omitted in printing).

[File endorsement omitted]

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[fol. 311] Telephone 2-1921

E. B. USSERY
Attorney and Counsellor at Law
Security Federal Building
Columbia 1, S. C.

March 15, 1960

Mr. Arnold Murray
Clerk
United States District Court
Burlington, Vermont

Re: Central Vermont Railway, Inc., et al. v. United States and Interstate Commerce Commission, U.S.D.C. Dist. of Vermont—C.A. 2713

Dear Mr. Murray:

The United States and the Interstate Commerce Commission, defendants in above-styled action, are filing a Motion for Reconsideration.

I have read the Motion and as intervening defendant in this case I adopt the points and authorities set forth in

the Motion as though they were my own and further urge upon the Court that the Judgments for the plaintiffs should be vacated and set aside and that Judgments should be entered for the defendants.

The original of this letter is for your file, and the three copies are for the convenience of the Court. Copies of this letter are being served on all parties of record by first class mail. Please indicate on the attached fourth copy of this letter the date of filing and return to me.

Very truly yours,

E. B. Ussery, Attorney for Intervening Defendants.

EBU:ehf
Encl.

Endorsed: Filed March 17, 1960.
Arnold A. Murray, Clerk.

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[fol. 312] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

ORDER DENYING MOTIONS FOR RECONSIDERATION—
March 26, 1960

The motions for reconsideration filed March 17, 1960 (1) on behalf of the United States of America and the Interstate Commerce Commission, defendants, and (2) on behalf of intervening defendants, are severally denied.

Sterry R. Waterman, U. S. Circuit Judge, James T. Foley, U. S. District Judge, Ernest W. Gibson, U. S. District Judge.

[fol. 313]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

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CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

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NOTICE OF APPEAL OF H. K. PORTER COMPANY, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed May 5, 1960

I.

Notice is hereby given that the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, intervening defendants in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court, the exhibits submitted by government counsel [fol. 314] and received in evidence by the court July 9, 1959, and the following:

(a) Complaint filed March 12, 1959, by Central Vermont Railway, Inc., et al., plaintiffs, including the exhibits attached thereto;

(b) Order of the court filed April 3, 1959, permitting withdrawal of certain parties' certificates;

(c) Order of the court filed April 8, 1959, designating three-judge statutory court;

(d) Answer of the defendants United States of America and the Interstate Commerce Commission to the complaint;

(e) Motion and notice of motion to intervene by H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(f) Answer of intervenors H. K. Porter Company, Inc. —Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al., to the complaint;

(g) Order of the court filed May 23, 1959, permitting intervention of H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(h) Opinion and judgment of the court filed March 7, 1960;

(i) Motion by the United States of America and the Interstate Commerce Commission for reconsideration and to alter or amend the judgment;

(j) Letter dated March 15, 1960, by E. B. Ussery for intervening defendants, adopting motion for reconsideration by defendants United States of America and Interstate Commerce Commission;

(k) Order of the court filed March 26, 1960, denying motions for reconsideration;

[fol. 315] (l) This notice of appeal.

## III.

The following questions are presented by this appeal:

(1) Whether the district court erred in annulling and setting aside an order of the Commission which directed rail carriers operating within the United States to cease and desist from violating Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, which found certain rates unreasonable, in violation of Section 1, 49 U.S.C., Section 1, and awarded reparation, *on the ground* that the assailed rates from Canadian origins to southern destinations maintained by the rail carriers over established through routes were not indivisible entities, and that the Commission did not have jurisdiction to consider them as such because *one of the factors* constituting the total through rate which had been assailed and found unlawful was beyond the jurisdiction of the Commission.

(2) Whether the district court erred in holding that the Commission did not have jurisdiction over a proportional rate, filed with the Commission by the Canadian carriers pursuant to Section 6 of the Interstate Commerce Act, 49 U.S.C., Section 6, applying from the Canadian origins to East Alburgh and Newport, Vermont, such rate being duly restricted so as to apply *only* on shipments moving to destinations in the United States to which no through joint rates were published in the tariff.

(3) Whether the district court erred in annulling and setting aside an order of the Commission on the ground that the Commission has no jurisdiction with respect to rates over rail transportation conducted by Canadian carriers between the International Boundary and interchange [fol. 316] points of East Alburgh and Newport, Vermont, which are located, respectively, three and five miles south of the International Boundary;

(4) Whether the district court erred in holding that the operations of the Canadian carriers within the United States between the International Boundary and East Alburgh and Newport, Vermont, the interchange points to which the proportional rate had been published, are sub-

ject to the jurisdiction of the Commission *only* with respect to finance and abandonment matters *but not with respect to proportional rates constituting one factor of a through rate over established through routes to points in the United States;*

(5) Whether the district court erred in holding that the Commission could not properly find unreasonable or unduly discriminatory the assailed total rail charge from Canadian origin points to final destination points in the United States, but was required to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering transportation within Canada even though such a distinction was made impossible by the carriers' method of publishing rates since the carriers failed to publish rates from the International Boundary to points in the United States, including points in official territory as well as points in southern territory;

(6) Whether the district court erred in holding that the Commission has no jurisdiction over the assailed rates from Canadian origins to the south, composed of a proportional rate from the Canadian origins to the interchange points in the United States and a local rate to the south, *because* they are not published in tariff form as joint rates, even though the rail carriers operating within the United [fol. 317] States are participating in an established through route and participating in the through charges assessed for the single service represented by the through route, and are bound by the terms and conditions contained in the through bill of lading issued by the originating carrier at point of origin in Canada;

(7) Whether the district court erred in annulling and setting aside an order of the Commission requiring the rail carriers operating within the United States to cease and desist from the maintenance of unlawful rates which created an unduly preferential-prejudicial rate relationship between competing shippers,—in violation of Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, *on the ground* that joint rates were assessed the preferred

shippers, *whereas* through rates based on combination of separate factors, one of which the district court held not subject to the jurisdiction of the Commission, under Section 1 of the Interstate Commerce Act, 49 U.S.C., Section 1, were assessed the prejudiced shippers;

(8) Whether the Interstate Commerce Commission has jurisdiction under Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, to order the removal of the unlawful discriminations found in the through joint rates applicable on shipments originating in Canada and destined to points in official territory, which by complaint had been assailed as being unduly preferential to shippers in official territory and unduly prejudicial to shippers in southern territory, without regard to the method of rate publication employed by the rail carriers in providing rates for use by the shippers in southern territory which the Commission found to be unduly prejudiced by the level of rates maintained to official territory;

(9) Whether the Commission was authorized under Section 13(1) of the Interstate Commerce Act, 49 U.S.C., Sec- [fol. 318] tion 13(1), to hear the complaints, and had jurisdiction under Section 16(1) of the Interstate Commerce Act, 49 U.S.C., Section 16(1), to enter an order awarding damages, when it found that the assailed through transportation charges assessed by rail carriers on International shipments originating in Canada and terminating in southern territory were unjust and unreasonable and in violation of Section 1 of the Interstate Commerce Act, 49 U.S.C., Section 1, when it found that the rail carriers had failed to establish just and reasonable rates, for the service rendered, from the International Boundary, as required by Section 1(5) and 6(1) and (7) of the Interstate Commerce Act, 49 U.S.C., Sections 1(5) and 6(1) and (7), and *in lieu thereof* had established, maintained and participated in through routes over which unjust and unreasonable through rates and charges were assessed;

(10) Whether the district court erred in denying the Commission jurisdiction to grant relief to southern shippers as prayed in their complaints on the ground that the

Commission did not have jurisdiction over one of the factors constituting the through charge assessed the southern shippers even though their only interest is in the total through charges assessed them compared with those assessed their competitors in official territory.

E. B. Ussery, 608 Security Federal Building, Columbia, South Carolina, Attorney for Intervening Defendants.

[fol. 319] [File endorsement omitted]

Certificate of Service (omitted in printing).

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[fol. 320]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

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CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

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NOTICE OF APPEAL OF INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed May 24, 1960

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960, and the order of the court entered March 26, 1960, denying defendants' motion for reconsideration.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court, the exhibits submitted by defendants and received in evidence by the court July 9, 1959, and the following:

(a) Complaint filed March 12, 1959, by Central Vermont Railway, Inc., et al., plaintiffs, including the exhibits attached thereto;

[fol. 321] (b) Order of the court filed April 3, 1959, permitting withdrawal of certain parties' certificates;

(c) Order of the court filed April 8, 1959, designating three-judge statutory court;

(d) Answer of the defendants United States of America and the Interstate Commerce Commission to the complaint;

(e) Motion and notice of motion to intervene by H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(f) Answer of intervenors H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al., to the complaint;

(g) Order of the court filed May 23, 1959, permitting intervention of H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(h) Opinion of the court filed March 7, 1960;

(i) Motion by the United States of America and the Interstate Commerce Commission for reconsideration and to alter or amend the judgment;

(j) Letter dated March 15, 1960, by E. B. Ussery for intervening defendants, adopting motion for reconsideration by defendants United States of America and Interstate Commerce Commission;

(k) Order of the court filed March 26, 1960, denying motions for reconsideration;

(l) This notice of appeal.

[fol. 322] III.

The following questions are presented by this appeal:

Asbestos moves from origins in Canada to consignees in official territory on joint rates over Canadian and American rail carriers which meet at interchange points within the United States. Asbestos moves from the same Canadian origins and through the same interchange points to consignees in southern territory on combination rates at a higher level consisting of (1) a proportional rate established by the Canadian carriers from the Canadian origins to the interchange points in the United States and (2) separately established rates by the American carriers from such interchange points to the south. The questions involved are:

(1) Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of the entire combination rate between the Canadian origins and points in the southern territory.

(2) Whether the District Court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of joint rates to points in official territory, while maintaining combination rates on a higher level for like service from the same Canadian origins to points in the south, were unduly prejudicial to consignees in southern territory and unduly preferential of consignees in official territory, in violation of Section 3(1) of the Interstate Commerce Act.

Robert W. Ginnane, General Counsel, H. Neil Garson, Associate General Counsel, Attorneys for Interstate Commerce Commission.

[fol. 323] [File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 324]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF UNITED STATES TO THE SUPREME COURT OF THE UNITED STATES—Filed May 25, 1960

I

Notice is hereby given that the United States of America, one of the above named defendants, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960, a timely motion for reconsideration of which judgment was denied on March 26, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253.

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript (1) the parts of the record which the notice of appeal filed by the defendant Interstate Commerce Commission designated for inclusion in said transcript, and (2) this Notice of Appeal.

III

The following question is presented by this appeal:

[fol. 325] Whether the district court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of

joint rates to points in Official Territory while maintaining combination rates on a higher level for like service from the same Canadian origins to points in Southern Territory, were unduly prejudicial to consignees in Southern Territory and unduly preferential of consignees in Official Territory, in violation of §3(1) of the Interstate Commerce Act.

Charles H. Weston, John H. D. Wigger, Attorneys for the United States of America, Department of Justice, Washington 25, D. C.

[fol. 326] [File endorsement omitted]

Certificate of Service (omitted in printing).

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[fol. 333]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

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CENTRAL VERMONT RAILWAY, INC., et al., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

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ORDER EXTENDING TIME TO DOCKET APPEAL IN SUPREME COURT—June 14, 1960

Upon application of the intervening defendants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, it appearing to the satisfaction of the Court that good cause has been shown for the enlargement of the time allowed for docketing this cause in the Supreme Court of the United States, it is hereby

Ordered, that the time for docketing this cause in the Supreme Court of the United States be extended from July 5, 1960 to July 23, 1960.

Dated at Brattleboro, this 14 day of June, 1960.

Ernest W. Gibson, United States District Judge.

[File endorsement omitted]

[fol. 334] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 335]

SUPREME COURT OF THE UNITED STATES

Nos. 257, 258 and 266—October Term, 1960

H. K. PORTER COMPANY, INC., et al., Appellants,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.;

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.; and

UNITED STATES, Appellant,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.

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Appeals from the United States District Court for the District of Vermont.

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ORDER NOTING PROBABLE JURISDICTION—October 17, 1960

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

October 17, 1960